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# Promises of Accession: Reassessing the Trade Relationship Between Turkey and the European Union

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# PROMISES OF ACCESSION: REASSESSING THE TRADE RELATIONSHIP BETWEEN TURKEY AND THE EUROPEAN UNION

FERNANDA G. NICOLA\*

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## INTRODUCTION

This Article reassesses the Turkey-European Union trade relationship in light of the doctrine of promissory estoppel and the history of Turkish accession to the European Union. It argues that the Court of First Instance (CFI) and the European Court of Justice (ECJ) in *Yeda Tarim* should have used more explicitly the doctrine of promissory estoppel as an equitable device to create liability for the potential detriment suffered by Turkey in relying on the promises made by Brussels. Part I provides a short overview of Turkey-European Union relations from the early 1950s until today, with particular attention to accession negotiations and the trade relationship between Turkey and The European Economic Community. Turkey's 1987 application for European Community (EC) membership began a tortuous path for the aspiring new member marked by Turkey's efforts to meet the European criteria for accession. In 1995 Turkey became the first member of the European Community Customs Union without being at the same time an official candidate for accession.<sup>1</sup> This anomalous situation is central to this Article's claims about the unbalanced Turkey-European Union trade relationship. Turkey was compelled to make serious political, economic and administrative reforms to work towards E.U. membership. The failure of those reforms to bring about concrete progress towards accession began to foster Turkish government and public distrust of Brussels.

In 1999, The European Council finally decided that Turkey would be officially considered a candidate of accession after Greece lifted its veto on the Turkish candidacy.<sup>2</sup> As of 2008, the Commission's latest progress report shows modest improvements in the country's economic and democratic institutions, but it nevertheless continues

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1. See Meltem Müftüler-Bac & Lauren M. McLaren, *Enlargement Preferences and Policy-Making in the European Union: Impacts on Turkey*, 25 J. EUR. INTEGRATION 17, 20 (2003) (noting that Turkey is the only country to have concluded a customs union prior to full EU membership).

2. See Patrick R. Hugg, *Cyprus in Europe: Seizing the Momentum of Nice*, 34 VAND. J. TRANSNAT'L L. 1293, 1328 (2001) (explaining that the rapprochement between Turkey and Greece ultimately led to both Cyprus and Turkey becoming candidates for accession).

the ongoing negotiation process.<sup>3</sup> Turkey's difficulties in navigating the accession process over twenty years has created a backlash among Turkish political and legal elites who question whether accession is even worth pursuing. While many factors have contributed to this backlash, a primary cause is the increasingly unbalanced trade relationship between the European Union and Turkey. While the European Union imposes unilateral obligations on Turkey and has largely benefited from the Customs Union, Turkey has suffered economic losses as a result of efforts to comply with trade and legal obligations mandated by Brussels, and Turkey receives little of the financial help that the European Union normally grants to its future members.<sup>4</sup> Not surprisingly, Brussels' behavior has engendered a deep frustration among the Turkish political and legal elites by not living up to its promise of strengthening both sides of the trade relationship.

Part II analyses the *Yeda Tarim* decisions by the CFI and ECJ in order to show the Turkish legal elites' frustration with the unbalanced Turkey-European Union trade relationship. This part focuses on the doctrine of promissory estoppel, developed in common law jurisdictions and more broadly adopted in international law. In promissory estoppel cases, a party invokes the equitable enforcement of a promise that was technically not fully binding and yet induced the claimant's detrimental reliance. The doctrine of promissory estoppel entitles the claimant to damages for the detriment suffered. *Yeda Tarim*, the applicant before the Court of First Instance (CFI), invoked a number of unfulfilled promises that the European Union made to Turkey in the aftermath of the Ankara Association Agreement and that over time have worsened rather than strengthened the Turkish balance of trade.<sup>5</sup> Nevertheless, in this case

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3. See generally *Turkey 2008 Progress Report Accompanying the Communication from the Commission to the European Parliament and the Council: Enlargement Strategy and Main Challenges 2008-2009*, COM (2208) 674 final (Nov. 5, 2008) [hereinafter *Turkey 2008 Progress Report*] (acknowledging Turkey's improvement in certain areas but noting deficiencies in the implementation of democratic and political reforms).

4. See *infra* Part III.1 (discussing hardships imposed on Turkey by the imbalanced Turkey-EU trade relationships).

5. See, e.g., Case T-367/03, *Yeda Tarim ve Otomotiv Sanayi ve Ticaret A.Ş. v. Council of the European Union*, 2006 E.C.R. II-873, ¶¶ 36, 47.

the Court found no detriment for the claimant and no liability for the European Union.<sup>6</sup>

Part III places *Yeda Tarim* in the broader context of the existing trade relation between Turkey and the European Union created by the Ankara Association Agreement in 1963 and its subsequent protocol. The obligations undertaken by Turkey *vis à vis* the free movement of workers and services in the common market and *vis à vis* the E.U. foreign commercial policy have created certain economic patterns, such as the migration of Turkish workers and their families. Moreover, Turkey's obligations have prompted new disputes in which Turkey became a defendant before the World Trade Organization (WTO) for infringing its multilateral obligations.<sup>7</sup> This Article questions the reasoning of the European courts in *Yeda Tarim* through a broader understanding of the anomalous and unbalanced trade relationship between Turkey and the European Union.

## I. THE RELATIONSHIP BETWEEN TURKEY AND THE EUROPEAN UNION SINCE THE 1950S

### A. THE TORTUOUS PATH FROM ANKARA TO BRUSSELS

After entering the North Atlantic Treaty Organization (NATO) in 1952 and joining the Council of Europe in 1949, Turkey signed the Ankara Agreement with the European Economic Community (EEC) in 1963. This Association Agreement was based on Article 238 of the Treaty of Rome, which established that European countries with stable democracies and market economies could seek accession to become full members of the Community.<sup>8</sup> Thus, the Ankara Association Agreement represented a first step for Turkey towards a

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6. See *infra* text accompanying notes 116-18 (detailing the Court's holding in *Yeda Tarim*).

7. See Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, ¶¶ 2-3, WT/DS34/AB/R (Oct. 22, 1999) [hereinafter *WTO Appellate Body Report on Turkish Textiles*] (describing India's claim against Turkey for imposing trade restrictions required by its agreement with the EU).

8. Agreement Establishing an Association between the European Economic Community and Turkey, Sept. 1, 1963, 1964 O.J. (217) 3687 [hereinafter *Ankara Agreement*].

full membership in the EEC.<sup>9</sup> The Ankara Agreement set in place a three-step process which began with the establishment of a customs union and a trade liberalization regime between Turkey and the EEC.<sup>10</sup>

The three stages consisted of a preparatory phase, followed by a transitional and a final phase during which the association between Turkey and the EEC would create closer economic ties and facilitate Turkish membership.<sup>11</sup> During the preparatory stage, the EEC was supposed to give financial aid to Turkey to strengthen its economy in light of their future long-term relation.<sup>12</sup> The creation of a Customs Union was part of the final stage of the Ankara Agreement, which was concluded in 1995 and implemented by 1996.<sup>13</sup> The Ankara Agreement also created some institutions such as the Council of Association, with the task of monitoring, implementing, and improving the exchange of information between the contracting parties.<sup>14</sup> In the 1970s an Additional Protocol to the Ankara Agreement was signed to mark the end of a preparatory phase and Turkey's entrance into a transitional stage.<sup>15</sup> The Additional Protocol aimed to conclude the Customs Union between the parties, and the EEC committed to providing financial assistance to Turkey by

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9. *See id.* art. 28 (“As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community.”).

10. *See id.* art. 2 (outlining the agreement's principles and specific steps to Turkish economic and trade development); *see also* Meltem Müftüler-Baç, *The Impact of the European Union on Turkish Politics*, 34 E. EUR. Q. 159, 160-66 (2000) (reviewing Turkey's compliance with the three steps required by the Association Agreement).

11. Ankara Agreement, *supra* note 8, arts. 3, 4, 10.

12. *See id.* art. 3 (specifying that Turkey will fulfill its obligations during the preparatory stage “with aid from the Community”).

13. *Id.* art. 4(2).

14. *See id.* arts. 6, 22-25, 27 (establishing the Council of Association and delineating its functions).

15. *See id.* art. 3(2) (stating “[t]he change-over to the transitional stage shall be effected in accordance with Article 1 of the Provisional Protocol”); Additional Protocol and Financial Protocol Signed on 23 November 1970, Annexed to the Agreement Establishing the Association Between the European Economic Community and Turkey and on Measures to be Taken for their Entry into Force, pmbl., 1972 O.J. (L 293) 4 [hereinafter Additional Protocol] (asserting “the conditions have been established for passing from the preparatory stage to the transitional stage”).

several means including loans.<sup>16</sup> Furthermore, the Additional Protocol extended the protections of the four freedoms—goods, services, capitals and workers—to Turkish citizens and aimed to harmonize Turkish law with EEC directives.<sup>17</sup>

When Turkey officially applied for full membership in the European Community in 1987, several other Mediterranean countries had just joined.<sup>18</sup> Rather than accepting the Turkish request, the Commission deferred the negotiation for accession based on the fact that the Turkish democracy was not stable yet.<sup>19</sup> The Kurdish as well as the Cypriot problems were still looming in foreign policy.<sup>20</sup> But what made the Turkish candidacy more daunting in the European public opinion were the recurrent human rights violations together with the economic “backwardness” of the country.<sup>21</sup> Thus the

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16. See Additional Protocol, *supra* note 15, at pmbl. (aiming for a “progressive establishment of a customs union” between Turkey and the E.U.); Financial Protocol Annexed to the Agreement Establishing the Association Between the European Economic Community and Turkey, arts. 1-3, Nov. 23, 1970, 1972 O.J. (L 293) 4 [hereinafter Financial Protocol] (setting out the process by which Turkey may apply for financial aid from the EEC).

17. See Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191) 1, 9 [hereinafter Treaty on European Union] (mandating progressive abolition of restrictions on the free movement of goods, capital, workers, and services, thereby opening European markets and creating a free trade regime); Additional Protocol, *supra* note 15, tits. I-II (requiring progressive implementation of provisions for the free movement of goods, persons, and services); see also Bahri Yilmaz, *The Relations of Turkey with the European Union: Candidate Forever?* 2 (Ctr. for European Studies, Working Paper No. 167, 2008), available at [http://www.ces.fas.harvard.edu/publications/docs/pdfs/CES\\_167.pdf](http://www.ces.fas.harvard.edu/publications/docs/pdfs/CES_167.pdf) (referring to the freedom of trade, freedom of movement of labor, freedom of movement of persons, and freedom of movement of capital as the “four freedoms”).

18. See EUROPA, 1980-1989: The Changing Face of Europe – The Fall of the Berlin Wall, [http://europa.ed/abc/history/1980-1989/index\\_en.htm](http://europa.ed/abc/history/1980-1989/index_en.htm) (last visited Mar. 25, 2009) (reporting that Greece joined the EC in 1981, followed by Spain and Portugal in 1986).

19. Commission Opinion on Turkey’s Request for Accession to the Community. SEC (89) 2290 final, ¶¶ 10-11 (Dec. 17, 1989) [hereinafter Turkey’s Request for Accession].

20. See *id.* ¶ 9 (finding Turkey deficient “in the human rights situation and in respect for the identity of minorities”); see also Mehmet Ögütçü, *Turkey’s Place in the New Architecture of Europe: An Updated Assessment*, Oct. 2008, <http://egemenlikulusundur.org/ustat/ulastra/ogutcu2IV.htm> (chronicling the negative European response to Turkey’s “Kurdish problem”).

21. See Manfred Nowak, *Human Rights ‘Conditionality’ in Relation to Entry to, and Full Participation in, the EU*, in *THE EU AND HUMAN RIGHTS* 687, 691-92 (Philip Alston et al. eds., 1999) (clarifying why since the 1980s the EU began

European Community further delayed Turkey's accession and adopted instead the Matutes Package, geared to facilitate technical and financial assistance and conclude the Customs Union in 1995.<sup>22</sup> In 1997, during the European Council in Luxembourg, the European Union made clear that Turkey would not be included among the candidates to start the accession negotiations.<sup>23</sup> Not surprisingly this statement triggered an angry Turkish reaction.<sup>24</sup> According to the Copenhagen criteria established by the European Union in 1993, Turkey did not fulfill the requirements to join liberal, western democratic, and market regimes.<sup>25</sup>

These criteria, conditional to future membership, mandated that E.U. applicants fulfill three different objectives. First, applicants must have "stable institutions guaranteeing democracy, the rule of law, respect for human rights, and the protection of minorities." Second, they must have a "functioning market economy." Lastly, they must be able "to take on the obligations of political, economic, and monetary union."<sup>26</sup> The Copenhagen criteria also included Agenda 2000, a document supporting E.U. eastward enlargement by including the former ten Communist countries while excluding Turkey from the list.<sup>27</sup> Moreover, the Agenda recommended that

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assuming the responsibility for promoting human rights as well as political identities among its members); see also David Kennedy, *Turning to Market Democracy: A Tale of Two Architectures*, 32 HARV. INT'L L.J. 373, 382-85 (1991) (explaining how in European legal consciousness the linking of democratic practices to free trade regimes has been a successful strategy).

22. See HARUN ARIKAN, *TURKEY AND THE EU: AN AWKWARD CANDIDATE FOR EU MEMBERSHIP?* 72-73 (2d ed. 2006) ("The Matutes Package provided the main base for the EU to implement its containment policy for Turkey. In fact, the instruments of the Package were suited well [to] the EU's containment policy for Turkey, designed to strengthen EU-Turkey relations, while delaying the possibility of actual Turkish membership in the foreseeable future.").

23. See Yilmaz, *supra* note 17, at 8-9 (noting that despite "the dawn of a new era" with the end of 1997, Turkey would continue to maintain a special status and not be a candidate for accession negotiation).

24. See Müftüler-Baç, *supra* note 10, at 162-63 (reporting on political and public reactions in Turkey to the EU's rejection, including Turkey's accusing the EU of "erecting a cultural Berlin Wall").

25. See Christos Kassimeris & Lina Tsoumpanou, *The Impact of the European Convention on the Protection of Human Rights and Fundamental Freedoms on Turkey's EU Candidacy*, 12 INT'L J. HUM. RTS. 329, 334 (2008) (underscoring the EU's focus on Turkey's shortcomings in the human rights arena).

26. See Ian Barnes & Pamela Barnes, *Enlargement*, in *EUROPEAN UNION POLITICS* 421, 426 (Michelle Cini ed., 2007).

27. See Communication of the Commission, Agenda 2000: For a Stronger and



Turkey should increase its human rights standards and create more protections for different minority groups in its territory.<sup>28</sup> The recommendations of Agenda 2000 and the following rejection of Turkish accession created a strong backlash among Turkish political elites, who considered it a “slap in the face” from Brussels.<sup>29</sup>

Finally, during the Helsinki European Council in 1999, the European Union recognized Turkey as a candidate for accession similar to the Eastern European countries.<sup>30</sup> Despite the little improvement on the human rights front, the Helsinki summit declared that “Turkey is a candidate state destined to join the Union on the basis of the same criteria as applied to other candidate states.”<sup>31</sup> The Commission Reports in 2000 and 2003, closely monitoring the Turkish situation, cautioned the European Union on the limited features of the Turkish democratic system. According to the Commission, Turkey ought to deepen its pledges to democracy and the rule of law through institutional reform.<sup>32</sup>

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Wider Union, DOC 97/6, at 95 (July 15, 1997) [hereinafter Agenda 2000] (listing Hungary, Poland, Romania, the Slovak Republic, Latvia, Estonia, Lithuania, Bulgaria, the Czech Republic, Slovenia, and Cyprus as enlargement candidates); EUROPA, Activities of the European Union—Summaries of Legislation, Agenda 2000: For a Stronger and Wider Union, <http://europa.eu/scadplus/leg/en/lvb/160001.htm> (last visited Mar. 25, 2009) (declaring that the possibility of absorbing the ten former Communist countries was “one of the major reasons for the Agenda 2000 reforms”).

28. See Agenda 2000, *supra* note 27, at 56-57 (commending Turkey on its customs union but noting that its political structure and pursuit of democracy have not yet achieved sufficient improvements).

29. Kassimeris & Tsoumpanou, *supra* note 25, at 334.

30. See *id.* at 335; see also Treaty on European Union, *supra* note 17, tit. VII, art. O (describing the accession procedure). Any European State may apply for membership. *Id.* After a State’s submission of a formal application, the Commission presents an opinion to the Council, which acts unanimously after receiving assent by an absolute majority of the Parliament. *Id.*

31. Kassimeris & Tsoumpanou, *supra* note 25, at 335.

32. See COMM’N OF THE EUROPEAN COMMUNITIES, 2000 REGULAR REPORT FROM THE COMMISSION ON TURKEY’S PROGRESS TOWARDS ACCESSION 12-14 (2000) [hereinafter 2000 REGULAR REPORT], available at [http://ec.europa.eu/enlargement/archives/pdf/key\\_documents/2000/tu\\_en.pdf](http://ec.europa.eu/enlargement/archives/pdf/key_documents/2000/tu_en.pdf) (asserting that although Turkey has made efforts at reform, those efforts are not making sufficient progress); COMM’N OF THE EUROPEAN COMMUNITIES, 2003 REGULAR REPORT FROM THE COMMISSION ON TURKEY’S PROGRESS TOWARDS ACCESSION 43-45 (2003) [hereinafter Turkey Progress Report 2003], available at [http://ec.europa.eu/enlargement/archives/pdf/key\\_documents/2003/tr\\_tk\\_final\\_en.pdf](http://ec.europa.eu/enlargement/archives/pdf/key_documents/2003/tr_tk_final_en.pdf) (outlining several advances but continuing to identify inconsistencies or lack of implementation in the democratic systems and rule of law).

In the meantime, from the 1980s until 2001 Turkey began adopting a number of harmonization packages and technical measures constituting the *acquis communautaire* (the cumulative law of the European Union) with the hope of speeding up the application process.<sup>33</sup> In 2002, the Copenhagen European Council stated that it would immediately start the negotiations with Turkey in 2004 if, on the basis of a Commission's report, the country fulfilled the Copenhagen criteria.<sup>34</sup> While the accession negotiations between the European Union and Turkey started in October 2005, of the thirty-five chapters of the *acquis* that were opened, only one was closed in 2006.<sup>35</sup>

Meanwhile, Olli Rehn, the Commissioner responsible for Enlargement, stated that the negotiation process with Turkey was likely to be "a long, difficult, and tortuous journey."<sup>36</sup> At this point, on top of the foreign policy tensions with Cyprus and the explosive Kurdish situation in part of the country, the Commission identified several other problems likely to create serious impediments to the Turkish accession.<sup>37</sup> For instance, the government kept in place those

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33. See Esin Örüçü, *Seven Packages towards Harmonisation with the European Union*, 10 EUR. PUB. L. 603, 603-07 (2004) (describing the seven harmonization packages that make fundamental changes in crucial areas of law in an attempt to move Turkey towards integration into the EU).

34. Presidency Conclusions of Copenhagen European Council (Dec. 2002), ¶ 19 [hereinafter 2002 Presidency Conclusions] (promising negotiations without delay if Turkey fulfills the Copenhagen criteria).

35. See Commission of the European Communities, *Turkey 2006 Progress Report*, at 4, COM (2006) 649 final (Nov. 8, 2006) [hereinafter *Turkey 2006 Progress Report*] (noting that negotiations on the science and research chapter were provisionally closed).

36. See José Casanova, *The Long, Difficult, and Tortuous Journey of Turkey into Europe and the Dilemmas of European Civilization*, 13 CONSTELLATIONS 234, 234 (2006) (attributing in part the difficulties with Turkey's accession to the "nativist anxieties over predominantly Muslim immigration").

37. See Vedat Can Ye insü, *Europe's Janus-Faced Rights: Ankara Caught between Brussels and Strasbourg* 8-10 (2008) (unpublished manuscript, on file with author) (identifying four categories of obstacles preventing Turkey's accession to the EU: "politically-motivated restrictions on personal and individual liberties, political activity, and freedom of expression and association"; "legal and administrative anachronisms resulting from structures in Turkey which have not [kept] apace of global developments, in particular industrialisation and urbanisation"; "serious political decay – corruption, weakness of civilian institutions vis-à-vis the military, and general and endemic administrative inefficiency"; and "cultural and religious issues with deep roots both within Turkish society and, more specifically, the attitudes of local administrators").

restrictions imposed by the military regime of 1980-1983 on personal and individual liberties, such as freedom of association and expression.<sup>38</sup> Another problematic issue was the “administrative anachronism” pervading bureaucratic and judicial practices, often under scrutiny for transparency and corruption problems.<sup>39</sup> Finally, the widespread fear that the Justice and Development Party (AKP) will transform Turkey into a Muslim fundamentalist state is very much alive in Europe.<sup>40</sup> In this perspective, the resurgence of *Laïcité* (secularism) in France has delayed even further the prospects of accession for Turkey.<sup>41</sup> The long journey from Ankara to Brussels is far from being over, and as a result, the backlash among the Turkish public has turned the hope of westernizing and modernizing the country into a deep disillusionment towards the entire E.U. accession process.<sup>42</sup>

Recently, the 2008 Progress Report published by the European Commission analyzed the Turkish situation in light of the political and economic criteria for membership, and reviewed the Turkish capacity to implement the E.U. secondary legislation and policies.<sup>43</sup> The Progress Report clarifies the strategic importance of Turkey not only to secure the E.U. energy policy, especially in light of the strategic role that Turkey played during the Russia-Georgia crisis, but also to secure European borders and prevent conflicts.<sup>44</sup>

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38. ERGON ÖZBUDUN, CONTEMPORARY TURKISH POLITICS: CHALLENGES TO DEMOCRATIC CONSOLIDATION 119-20 (2000) (describing a situation where, although it has relinquished its formal powers, the military still wields considerable power over domestic affairs).

39. Ye insü, *supra* note 30, at 9-10.

40. See Casanova, *supra* note 36, at 240 (arguing that despite European prejudices, Turkey's current representative democracy evidences its readiness to join the EU).

41. See C.D. Lovejoy, Comment, *A Glimpse into the Future: What ahin v. Turkey Means to France's Ban on Ostensibly Religious Symbols in Public Schools*, 24 WIS. INT'L L.J. 661, 683-84 (2006) (describing how Islamic beliefs can be at odds with the French concept of secularism, particularly in the context of France's headscarf ban).

42. See Vincent Boland, *The Feeling is Mutual: Why Turks are Growing Disillusioned with Europe*, FIN. TIMES, Jan. 4, 2007, at 13 (observing that Turkish support for EU membership has declined from over 67% to about 35%); cf. *Europeanisation of Turkish Democracy?*, TURKISH DAILY NEWS, Oct. 6, 2003 (explaining that despite disillusionment by the Turkish public, the country continues to undergo reforms in an attempt to achieve accession negotiations).

43. See generally *Turkey 2008 Progress Report*, *supra* note 3.

44. See *Communication from the Commission to the Council and the European*

Despite the current financial crises, the Progress Report highlights the increasing economic interdependence between the European Union and Turkey and the solidity of the Turkish economy.<sup>45</sup> The Report acknowledges some shortcomings in the realm of the economic criteria for the accession, but overall it states that “Turkey is a functioning market economy. It should be able to cope with competitive pressure and market forces within the Union in the medium term, provided it implements its comprehensive reform programme in order to address structural weaknesses.”<sup>46</sup> In assessing the economic criteria for membership, the Commission acknowledges that Turkey has made important progress in those areas relevant to accession, such as the regulation of free movement of goods, intellectual property rights, anti-trust policy, energy, enterprise and industrial policy, and consumer protection.<sup>47</sup>

However, the Progress Report points to the recent political tensions between the Turkish Constitutional Court and the ruling Turkish party by suggesting that: “[A] new impetus now needs to be given to reform, in order to strengthen democracy and human rights, to modernize and develop the country and to bring it closer to the [European Union].”<sup>48</sup> Human rights, the protection of minorities, and women’s rights appear to be some of the most controversial issues on which the Commission argues that Turkey has made limited progress.<sup>49</sup> With respect to human rights and the protection of minorities, the Commission affirms that Turkey needs a more

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*Parliament: Enlargement Strategy and Main Challenges 2008-2009*, at 2, COM (2008) 674 final (Nov. 5, 2008) [hereinafter *Enlargement Strategy 2008-09*] (stating that “Turkey’s strategic importance to the EU has further increased in key areas such as energy security, conflict prevention and resolution and regional security in the Southern Caucasus and the Middle East”).

45. *Id.* at 6 (acknowledging that “Turkey is now a functioning market economy in terms of the Copenhagen economic criteria”).

46. *Id.* at 63.

47. *See id.* at 64-65 (illustrating that despite some progress in economic and monetary policy, Turkey must continue to confront several shortcomings vis-à-vis the “full independence of the central bank, the monetary financing of the public sector and privileged access by the public sector to financial markets.”).

48. *Id.* at 5.

49. *Id.* at 61-62 (explaining that one important factor in Turkey’s failure to meet the Copenhagen criteria is that despite a framework for women’s rights and gender equality, more efforts are necessary to actually realize those rights). *See* Rachel Rebouché, *The Substance of Substantive Equality: Gender Equality and Turkey’s Headscarf Debate*, 24 AM. U. INT’L L. REV. 713 (2009).

vigorous implementation the judgements of the European Court of Human Rights (ECtHR) by upgrading the “institutional framework for promoting and enforcing human rights.”<sup>50</sup>

The Progress Report is harsh in describing the attitude of the Turkish government towards minority rights in which “Turkey made no progress on alignment with European standards.”<sup>51</sup> The Commission points to the restrictions on using other languages other than Turkish in political life as well as in the media.<sup>52</sup> Moreover, minorities such as the Roma not only face a discriminatory treatment in social protection and the employment context, but they also face forced evictions in entire neighborhoods demolished by the government.<sup>53</sup> A similar problem exists in the southeast part of the country with the Kurdish minorities. Here, according to the Commission, the government needs to undertake further initiatives “to create the conditions for the predominantly Kurdish population to enjoy full rights and freedoms.”<sup>54</sup>

There, however, some critical considerations on both the procedure and the substance of the Progress Report. The type of scrutiny that the Commission exercises every year in its reports prompts the question of whether it is relevant to assess the discriminatory treatment of minorities such as Roma in Turkey. Especially when in the rest of the European Union such a minority has not encountered much better treatment. Recently a few cases before the ECtHR against Greece and the Czech Republic have condemned these countries for the discriminatory treatment of Roma children in relation to education.<sup>55</sup> In this respect, commentators

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50. *Id.* at 61.

51. *Id.* at 62.

52. *Id.*; see also *Turkey 2008 Progress Report*, *supra* note 3, at 24-26 (explaining that government-imposed restrictions “make broadcasting in languages other than Turkish cumbersome and non-viable commercially”).

53. *Enlargement Strategy 2008-09*, *supra* note 44, at 62; *Turkey 2008 Progress Report*, *supra* note 3, at 26.

54. *Enlargement Strategy 2008-09*, *supra* note 44, at 62.

55. See *Affaire Sampanis et Autres c. Grèce* [Sampanis and others v. Greece], No. 32526/05 (Eur. Ct. H.R. June 5, 2008), <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=71025&sessionId=21453468&skin=hudoc-en&attachment=true>; *D.H. and others v. Czech Republic*, No. 57325/00, ¶¶ 205-210 (Eur. Ct. H.R. Nov. 13, 2007), <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=22598&sessionId=21453680&skin=hudoc-en&attachment=true> (finding that the establishment of a separate

have pointed out a paradoxical consequence of compliance with the accession criteria and the Commission's strict scrutiny, which occurs only before, rather than after E.U. accession. For example, Bruno de Witte and Gabriel Toggenburg said that perhaps "accession will lead to a reduction of the European human rights standards for the candidate countries, and *could* therefore lead to a reduction of their actual respect for human rights."<sup>56</sup>

Even if this scenario appears rather extreme the scrutiny of human rights prompts to another question. If, according to the Commission, the economic criteria are more in tune than the political and human rights ones with the conditions of accession set up by the European Union, the latter seem also less objective and more open to manipulation. Not surprisingly, the Commission Report's detailed scrutiny of the democratic conditions and the situations that could lead to human rights violations in Turkey has been widely commented upon as an "excuse for resisting Turkey's membership, while the 'real' reasons could be traced to various political considerations."<sup>57</sup> Human rights violations and the discriminatory treatment of minorities have been the reason used over and over by the European Union to postpone Turkish accession in a way that seems to conceal deeper political and cultural problems, such as the geography, the large population, and the dominance of Islam in Turkey.

#### B. THE SMOOTHER PATH OF THE TRADE REGIME

Even though Turkey undertook numerous reforms toward democratization, and the trade regime between the European Union and Turkey is fully operative, the long and tortuous path towards

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education system for Roma children had resulted in de facto segregation and discrimination).

56. See Bruno de Witte and Gabriel N. Toggenburg, *Human Rights and Membership of the European Union*, in THE EUROPEAN UNION CHARTER OF FUNDAMENTAL RIGHTS 59, 69 (Steve Peers & Angela Ward eds., 2004) (suggesting that this might be a potential problem "for those matters which, although duly examined in the human rights sections of the pre-accession reports, are not evidently within the scope of EC internal competence, such as: the rights of children, prison conditions and minority protection"). The authors further theorize that "the EU institutions will suddenly have to cease being interested in minority protection in Latvia, children's rights in Romania and prison conditions in the Czech Republic, once these countries have joined the EU." *Id.*

57. Kassimeris & Tsoumpanou, *supra* note 18, at 339.

membership is far from coming to an end. The Commission announced several times that the negotiation process would be open-ended.<sup>58</sup> Despite the uncertainty about the Turkish accession, trade between the Union and Turkey has continuously expanded over time.<sup>59</sup> The Commission's website states that the European Union and Turkey "enjoy a deep trade relationship" and that the Union is "number one in both Turkey's imports and exports while Turkey ranks 7th in the [European Union]'s top import and 5th in export markets."<sup>60</sup> Finally, in the 2008 Progress Report, the Commission states that the European Community-Turkey Customs Union contributes increasing bilateral trade that has reached nearly 100 billion Euros in 2006 and made Turkey one of the European Union's major trading partners.<sup>61</sup>

From 1996 until today, however, the Customs Union has created very disparate effects for its two partners.<sup>62</sup> The free movement of workers and services provisions incorporated in the Ankara Association Agreement and its Protocol have been interpreted by the ECJ in a way that created generous distributive effects for Turkish workers in the European Union.<sup>63</sup> Once Turks leave their home state

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58. See EurActiv.com, EU-Turkey Relations, <http://www.euractiv.com/en/enlargement/eu-turkey-relations/article-129678> (last visited Mar. 28, 2009) (positing that the even though the "underlying and shared objective" of Turkey's negotiating talks is accession, the ultimate outcome of accession is not guaranteed).

59. For instance, since the creation of the Customs Union, it reached 75 billion Euros in 2005. See Council of the European Union, Association with Turkey – Establishment of the Position of the European Union for the 45th Association Council Meeting (Luxembourg, 12 June 2006), at 31, available at [http://www.tobb.org.tr/abm/mevzuatvedokumanlar/st10324\\_en06.doc](http://www.tobb.org.tr/abm/mevzuatvedokumanlar/st10324_en06.doc) (observing some "unfulfilled commitments" by Turkey that hamper the success of the E.U.-Turkey Customs Union).

60. See European Commission, Bilateral Trade Relations: Turkey, [http://ec.europa.eu/trade/issues/bilateral/countries/turkey/index\\_en.htm](http://ec.europa.eu/trade/issues/bilateral/countries/turkey/index_en.htm) (last visited Mar. 28, 2009).

61. *Turkey 2008 Progress Report*, *supra* note 3, at 5.

62. Some scholars have shown that this customs regime has been more beneficial to the EU than to Turkey. See CHRIS RUMFORD, EUROPEAN COHESION? CONTRADICTIONS IN EU INTEGRATION 94, 105-06 (2000) (explaining that the pre-single market phase tends to "promote concentrations of development in the already prosperous areas of the EU" and "exacerbate divergent standards of living").

63. See Edgar Lenski, *Turkey and the EU: On the Road to Nowhere?*, 63 HEIDELBERG J. INT'L L. 77, 84-85 (2003) (summarizing developments following the implementation of the Ankara Agreement's free movement of workers

and become labor migrants in Europe, the Member States cannot discriminate against them and therefore exclude them from the same employment and other social security benefits granted to their own nationals. In this respect, Turkish migrant workers have won a number of salient legal battles on European soil. Since the 1990s the ECJ has recognized a number of individual rights for Turkish migrants derived directly from the provisions of the Ankara Association Agreement, its Protocol, and the decisions of the Council of Association.<sup>64</sup> Thus, the status of Turkish migrants today is more privileged than that of any other third country national in the European Union. The Ankara Agreement has played a significant role in favoring the integration of Turkish workers and their families through easier access to residency permits and other employment benefits in Europe.

By contrast, the European Union sets up cross-border projects and pre-accession redistributive schemes to support the economies of non-member countries. While Turkey has been a member of the Customs Union since 1996, it has never had access to such pre-accession financial aid or other forms of cooperation projects.<sup>65</sup> While other countries entering customs unions with the EU benefited from the European Community cohesion policy strategies, Turkey did not.<sup>66</sup> Cohesion policies consist of financial support that is allocated to prepare the new members to cope with the pressures of the European competitive trade regime, high volume of imports, and market deregulation. In this respect, Chris Rumford highlighted that the attitude of the European Union toward Turkey has been highly contradictory:

Turkey, via the Customs Union, has been accepted as an economic partner in the single market, but at the same time is excluded from the range of projects that are designed to underpin the common market . . . . Expanding the common

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provisions).

64. *Id.*

65. See RUMFORD, *supra* note 63, at 93 (maintaining that “Turkey is excluded from almost all the EU projects that are designed to facilitate the economic integration of non-member countries”).

66. See *id.* (“The funds allocated to pre-accession are dwarfed by the Cohesion Fund payments to existing members.”).



market does not necessarily go hand-in-hand with enlarging the [European Union].<sup>67</sup>

When compared to the aid that the Eastern European countries received prior to the 2004 enlargement, Turkey has borne most of the costs rather than shared in the benefits of European economic integration by never entering the pre-accession category.<sup>68</sup> As Rumford emphasizes:

The most striking feature of the cross-border initiatives . . . is the systematic exclusion of Turkey from almost all of them. . . . The exclusion of Turkey is more significant following the introduction of the Customs Union which underpins Turkey's economic bond with the EU, and which confers upon Turkey a degree of economic integration matched by no other non-member country.<sup>69</sup>

Lately, however, this much criticized disparate regime has come to an end. In 2007 the European Commission approved its new strategy of E.U. financial assistance for the period 2007-2009 through the Instrument for Pre-Accession Assistance.<sup>70</sup> During this period Turkey, together with other countries seeking accession, would receive funding from the European Union to promote democratic and economic development on its path to E.U. membership. According to the Commission, Turkey should receive about 1.602 billion Euros from Brussels through a two-year program geared to strengthen market and political institutions.<sup>71</sup>

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67. *Id.*

68. *See id.* at 107-08 (explaining that "pre-accession is a far more flexible and beneficial stage of membership" because pre-accession countries "have a clear perspective of membership" and "pre-accession includes participation in a wide range of EU initiatives . . . which assist with preparations for full membership").

69. *Id.* at 106.

70. *Commission Decision on a Multi-annual Indicative Planning Document (MIPD) 2007-2009 for Turkey*, C (2007) 1835 (Apr. 30, 2007), available at [http://ec.europa.eu/enlargement/pdf/mipd\\_turkey\\_2007\\_2009\\_en.pdf](http://ec.europa.eu/enlargement/pdf/mipd_turkey_2007_2009_en.pdf).

71. *See id.* at 16 (allocating the total assistance for institution building, cross-border cooperation, regional and rural development, and human resources development); *see also* Press Release, European Comm'n, European Commission Completes Multi-Annual Planning of Financial Assistance to the Candidate and Potential Candidate Countries (June 20, 2007), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/856> (pointing out that the EU's assistance to Turkey focuses on building strong institutions that will foster respect for human rights and the rule of law). For instance, in 2008 the Commission

## C. LEGAL TRANSPLANTS AND SOCIAL BACKLASH

The relationship between Turkey and Western Europe can be traced back at least to the Ottoman Empire. This long relationship shows how the legal arena is an important ground for furthering cooperation and channeling deep cultural and political struggles. In the late nineteenth century, Turkey became a borrower of legal models from Europe.<sup>72</sup> The transplant of legal regimes, and in particular of civil codes, was a welcome activity performed by legal elites, having a clear modernizing agenda initially for the Ottoman Empire and later for the Turkish Republic under Atatürk.<sup>73</sup> Legal elites borrowing European codes and legislative models aimed to place their country in conversation with Western jurists in Germany and France. At the same time, however, they sought to retain their own cultural and political autonomy from Western legal influences in areas that were not connected to the market. For example, in the realm of family law, comparative lawyers have shown how the legal transplant of the Swiss civil code to modernize Turkish family law in the 1920s created legal mismatches.<sup>74</sup>

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adopted for the period 2008-2010 an Instrument for Pre-Accession for Turkey that will provide approximately 540 million Euros in financial assistance. *Turkey 2008 Progress Report*, *supra* note 3, at 5.

72. See BERNARD LEWIS, *THE EMERGENCE OF MODERN TURKEY* 109-10 (2d ed. 1968) (explaining that the early Turkish commercial code was based almost entirely on French law); see also NIYAZI BERKES, *THE DEVELOPMENT OF SECULARISM IN TURKEY* 160-69 (1964) (observing that Turkey's commercial relations with outsiders necessitated the adoption of a commercial code).

73. See ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 98 (2d ed. 1993) (suggesting that even fixed areas of Turkish private law, such as family law, were modernized as a result of foreign influence); Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in *THE OXFORD HANDBOOK OF COMPARATIVE LAW* 441, 451 (Mathias Reimann & Reinhard Zimmermann eds., 2006) (recognizing the modernization of the Turkish law as a conscious choice made by the government despite resistance from the majority of the population); see generally Pier Giuseppe Monateri, *The 'Weak Law': Contaminations and Legal Cultures*, *GLOBAL JURIST ADVANCES*, Issue 3 – 2001, art. 5, at 21, available at <http://www.bepress.com/gj/advances/vol1/iss3/art5> (providing an overview of transplants and suggesting that “the practice of borrowings has always been a normal practice”), Duncan Kennedy, *The Globalizations of Law and Legal Thought* in *THE NEW LAW AND DEVELOPMENT: A CRITICAL APPRAISAL* (David Trubek & Alvaro Santos eds., 2006) (suggesting that the practice of borrowings in the first globalization operated differently with respect to the market or the family).

74. See Ruth A. Miller, *The Ottoman and Islamic Substratum of Turkey's Swiss Civil Code*, 11 *J. ISLAMIC STUD.* 335, 335-36 (2000) (attributing the success of the

The most recent example of legal transplant in Turkey results from the pressure that Brussels places on Turkish legal and political elites to adopt the *acquis communautaire* to harmonize Turkish law with E.U. standards.<sup>75</sup> Unlike the nineteenth century, today Turkish legal elites are under pressure from supranational actors; Brussels and Strasbourg have played a major role in the Turkish government's adoption of E.U. law and respect of the European Convention of Human Rights (ECHR). Despite their Herculean harmonization efforts, Turkish politicians and lawyers have received contradictory signals from Brussels, the E.U. Courts in Luxembourg, and the ECtHR in Strasbourg.<sup>76</sup> On one hand, the denial of E.U. membership has frustrated the efforts of the Turkish legal elites who have been struggling to adopt directives harmonizing their market to E.U. legal standards; on the other hand, the ECHR has upheld several Turkish policies, such as the ban on headscarves in Universities, that appear incompatible with the country's effort to democratize.<sup>77</sup> In this respect, Brussels seems to espouse the analysis of Samuel Issacharoff, who defined Turkey as a "fragile" democracy.<sup>78</sup> Even though the Turkish government successfully shattered and dissolved the elected Islamic Welfare Party, the ECtHR legitimized this

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Swiss Code in Turkey to a loose translation of its contents, which allowed for a better fit between the Code and the society to which it was applied); Esin Örüçü, *Turkey: Reconciling Traditional Society and Secular Demands*, 26 J. FAM. L. 221, 233-35 (1987-88) (suggesting further upgrades to the Turkish family law but recognizing that the Turkish courts have modernized the Civil Code through liberal interpretation).

75. See European Commission – Enlargement, How Does a Country Join the EU?, [http://ec.europa.eu/enlargement/enlargement\\_process/accesion\\_process/how\\_does\\_a\\_country\\_join\\_the\\_eu/negotiations\\_croatia\\_turkey/index\\_en.htm](http://ec.europa.eu/enlargement/enlargement_process/accesion_process/how_does_a_country_join_the_eu/negotiations_croatia_turkey/index_en.htm) (last visited Mar. 28, 2009) (demonstrating that in order for Turkey to join the EU, it needs to prove, among other things, its ability to "effectively apply and implement the *acquis*," and explaining the content of the *acquis communautaire*).

76. See Ye insü, *supra* note 37, at 18-25 (exploring the contradictory messages that the Commission in Brussels and the ECHR in Strasbourg have been sending to Turkey regarding human rights standards).

77. See *Sahin v. Turkey*, App. No. 44774/98, 41 Eur. H.R. Rep. 109, ¶¶ 165-66 (2005) (upholding a ban on Islamic headscarves at Istanbul University because it was instituted "to preserve the secular nature of educational institutions").

78. See Samuel Issacharoff, *Fragile Democracies*, 120 HARV. L. REV. 1405, 1444-47 (2007) (reflecting on the decision of Turkey's Constitutional Court dissolving the Welfare party for its anti-secular position).

behavior that would otherwise be considered dangerous for any other Western democratic regime.<sup>79</sup>

The human rights saga is only part of what has triggered a major backlash among the Turkish elites, who have expressed soaring frustration with accession to the European Union. While accession requires an enormous effort to incorporate the *acquis communautaire*, the Turkish political and legal elites who undertook this effort received little recognition.<sup>80</sup> As commentators put it, despite this long and burdensome process, Turkey is the “longest-standing applicant to join the Community . . . [and] it is the longest-standing of those who remain frustrated.”<sup>81</sup>

Generally, the narrative of enlargement often has been presented as the path for accession countries to seek membership in the exclusive club of Western democracies.<sup>82</sup> Thus, there is an exclusive benefit for new members rather than for the European Union. Many commentators, however, have portrayed an alternative narrative of accession. They have highlighted gains not only for the new members, but in particular for the Union in requiring unilateral economic and political reforms without committing to grant membership. In writing about the Eastern European enlargement, scholars have noted the gains for the European Union and its long-term members: “They have gained industrial free trade without making a commitment to grant membership. Unless membership comes quickly, there will be a significant negative symmetry for most of the less developed associate countries after 2001.”<sup>83</sup> Despite the implicit gains of expanding its markets and its political and security borders, the European Union nevertheless can dictate unilaterally the rules of accession. Thus, “at the time when the

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79. See *Refah Partisi (The Welfare Party) v. Turkey*, 2003-II Eur. Ct. H.R. 269, ¶ 135 (2003) (justifying the dissolution of the Welfare Party as arising out of “pressing social need”).

80. Ian Ward, *The Culture of Enlargement*, 12 COLUM. J. EUR. L. 199, 212-22 (2005-06) (underscoring the EU’s distrust towards Turkey’s progress and describing Turkish politicians’ frustration with the EU).

81. *Id.* at 208.

82. See Kennedy, *supra* note 21, at 376-78 (suggesting that accession to the EU has become an “all or nothing proposition,” under which partial assimilation with the EU is insufficient).

83. ANDRÁS INOTAI, *What is Novel About Eastern Enlargement of the European Union?*, in ON THE WAY: HUNGARY AND THE EUROPEAN UNION 11, 17-18 (1998).

[Central and Eastern European countries] were coping with the task of satisfying a set of Copenhagen accession criteria and had opened their economies to [E.U.] businesses, there was no formal obligation from the European Union side to accept new members . . . .”<sup>84</sup> In other words, these scholars clarified that enlargement was not only beneficial for candidate countries, but was also highly beneficial to the European Union.<sup>85</sup>

Critical narratives about E.U. enlargement, underlining the benefits that the Union gains from its new members, have been largely overlooked by scholarship and the public opinion. In fact, mainstream narratives have highlighted the gains for the new members and the generosity of the European Union towards them. These mainstream narratives helped to legitimize the asymmetrical power between the Union and its aspiring members during the accession negotiation. Thus, the European Union can freely set the conditions for accession while not committing to grant membership to those countries that already undertook the path towards full membership by transplanting and harmonizing legal regimes and committing to trade as well as political obligations.

## II. *YEDA TARIM* AND PROMISSORY ESTOPPEL: THE TRADE RELATIONSHIP BETWEEN TURKEY AND THE EUROPEAN UNION

### A. RELIANCE ON THE ANKARA ASSOCIATION AGREEMENT

In *Yeda Tarim*, a Turkish company manufacturing ball bearings and importing spare parts for agricultural and automotive industry sued the EC for damages resulting from the manner in which the Customs Union was implemented between the EC and Turkey from 1996 to 2003.<sup>86</sup> In particular, the lifting of customs duties, which increased imports in Turkey, created a negative impact on Yeda

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84. GA INA ŽUKOVA, LEGAL ASPECTS OF TRADE IN GOODS BETWEEN THE EU AND ITS CANDIDATE STATES: THE CASE OF LATVIA 21 (2004).

85. *Id.* at 23 (explaining that enlargement “is very much about EU gains, a fact which is very often forgotten in the western perception of the accession of [E]astern Europe countries to the EU”).

86. Case T-367/03, *Yeda Tarim ve Otomotiv Sanayi ve Ticaret A. v. Council of the European Union*, 2006 E.C.R. II-873, ¶ 20.

Tarim's commercial activities.<sup>87</sup> In pursuing compensation through damages under Article 288 EC, the plaintiff complained that the Community never gave the financial support promised in the Ankara Association Agreement, and it failed to comply with its obligations towards Turkey.<sup>88</sup> With respect to the causal link between the loss suffered and the unlawful conduct of the EC, the applicant claimed that the Customs Union had a negative effect on the Turkish economy as a whole and that while its production suffered losses, its imports were also damaged by the intense competition of cheap quality goods entering the Customs Union from the Far East.<sup>89</sup>

The Court of First Instance rejected Yeda Tarim's claim by holding that the case did not present unlawful conduct of the EC since "the case-law requires that there must be established a sufficiently serious breach of a rule of law intended to confer rights on individuals."<sup>90</sup> With regard to the provisions of the Ankara Agreement, the CFI held, by referring to *Demirel*, that those provisions were to be considered as "programmatic in nature." Consequently, the Court ruled out that such provisions would have direct effect on the appellant's situation.<sup>91</sup> As to the Financial Protocol, the Court held that the applicant did not state what provisions conferred an individual right on Yeda Tarim.<sup>92</sup> Further, the Court found no EC declarations with a promise to grant 2.5 billion Euros to Turkey when entering the Customs Union.<sup>93</sup> The CFI held that only the Preamble of the 1970 Additional Protocol provided that "mutual and balanced obligations" should be undertaken by both parties.<sup>94</sup> This, according to the Court, was only a programmatic obligation from which direct effect could not be derived.<sup>95</sup>

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87. *Id.* ¶ 24.

88. *Id.* ¶ 22.

89. *Id.* ¶¶ 23-24.

90. *Id.* ¶ 35 (citing, among others, the well-known state liability case, Joined Cases C-46/93 and C-48/93 *Brasserie du Pecheur v. Bundesrepublik Deutschland*).

91. *See id.* ¶¶ 39-42 (concluding that because the Ankara agreement did not provide detailed rules for carrying out its goals but was later supplemented by the Additional Protocol, it did not have direct effect on the applicant).

92. *Id.* ¶ 45.

93. *Id.* ¶ 46.

94. *Id.* ¶ 49 (finding preamble language does not create legal obligations).

95. *Id.* ¶¶ 42, 49 (arguing, essentially, that the agreement is not sufficiently precise and unconditional and, therefore, does not confer rights on individuals).

The CFI textualist interpretation is surprising when compared to the generous interpretation of the ECJ in establishing the direct applicability of the decisions of the Council of Association in the case of the free movement of Turkish migrants in the European Union.<sup>96</sup> Similar to its free movement decisions addressing Turkish workers, the CFI could have adopted in this case a teleological interpretation supporting the applicant's claims.<sup>97</sup> Rather than focusing on the text of the agreement, a teleological interpretation requires an evaluation of the goals of the ongoing relationship between the EC and Turkey beginning at the time of the Ankara Agreement. In establishing the unlawfulness of the conduct of the Community, the Court could evaluate the meaning of unlawfulness in the context of the European Union's ongoing promises to Turkey. The contractual relationship between the parties, who entered into several international treaties by means of the Ankara Agreement and its protocols, also created a reliance interest in Turkey insofar as both parties committed, through long negotiations, international agreements, and diplomatic relations, to "promote the continuous and balanced strengthening of trade and economic relations between the Parties, while taking full account of the need to ensure an accelerated development of the Turkish economy and to improve the level of employment and the living conditions of the Turkish people."<sup>98</sup>

In international law the doctrine of estoppel has been adopted, not without difficulties, in cases in which the behavior of Country A has led Country B to believe that it would engage in a certain action, and therefore Country B relied on a future action.<sup>99</sup> In a well-known case,

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96. See Bulent Cicekli, *Legal Integration of Turkish Immigrants under the Turkish-EU Association Law*, TURKISH WKLY, <http://www.turkishweekly.net/article/22/legal-integration-of-turkish-immigrants-under-the-turkish-eu-association-law.html> (last visited Mar. 28, 2009) (arguing the Court's approach evidences an attempt to realistically balance migrant worker's expectations and Member States' national interests in immigration).

97. See Case 26/62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration*, 1963 E.C.R. 1 (propounding that in order to determine whether treaty provisions have direct effect, courts must consider not only the wording, but also the spirit and the general scheme of the treaty).

98. Ankara Agreement, *supra* note 8, art. 2(1).

99. See JAN KLABBERS, *THE CONCEPT OF TREATY IN INTERNATIONAL LAW* 93-94 (1996) (explaining that the doctrine of estoppel is usually "applied in situations of law-application rather than law making"); I. C. MacGibbon, *Estoppel In International Law*, 7 INT'L & COMP. L.Q. 468, 512-13 (1958) (acknowledging that

the International Court of Justice (ICJ) adopted the doctrine of estoppel by holding that, due to Thailand's behavior, Cambodia was led to believe that it had accepted a particular territorial delimitation.<sup>100</sup> When Thailand tried to challenge this territorial delimitation, which included land of great religious salience for both countries on the Cambodian side of the border, the ICJ held that Thailand's conduct had induced Cambodia to rely on it by accepting the new delimitation.<sup>101</sup> In another well-known ICJ case, *Barcelona Traction, Light and Power Co.*, Belgium sued Spain, seeking reparation for damages caused to its nationals who were shareholders of Barcelona Traction, Light and Power Company and who were damaged by the Spanish government's actions towards the company's operations in Spain.<sup>102</sup> After Belgium's initial suit against Spain, the parties entered into negotiations, and Belgium withdrew its suit. When negotiations failed, Belgium tried to re-file the suit, and Spain claimed that it was estopped from bringing the suit again because Spain had relied on Belgium's agreement to negotiate. The ICJ rejected the notion that Spain had suffered some detriment because, without Spain's agreement to negotiate, the initial lawsuit would have proceeded, and thus it found no estoppel.<sup>103</sup> The ICJ constructed the notion of estoppel narrowly by requiring a showing of how Belgium induced Spain to act or to refrain from acting and a showing of detriment suffered by Spain in relying upon Belgium's representations.<sup>104</sup>

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some aspects of estoppel are in the process of becoming an international customary norm).

100. *Temple of Preah Vihear (Cambodia v. Thailand)*, 1962 I.C.J. 6, 33 (June 15).

101. *See id.* at 32-33 (deciding that Thailand had received and accepted the territorial delimitation as evidenced by the country's conduct); *see also* KLABBERS, *supra* note 99, at 93-94 (using *Temple of Preah Vihear* to illustrate the application of estoppel and to caution that "states may end up being estopped from acting contrary to a non-legally binding agreement they concluded").

102. *See Barcelona Traction, Light & Power Co. (Belg. v. Spain)*, 1964 I.C.J. 6, 9 (July 24).

103. *See id.* at 24-25 (determining that Spain's use of an estoppel argument to attempt to preclude Belgium from re-bringing a claim that had been subject to a discontinuance and failed negotiations did not show sufficient reliance or detriment on Spain's part to constitute an estoppel defense).

104. Christopher Brown, *A Comparative and Critical Assessment of Estoppel in International Law*, 50 U. MIAMI L. REV. 369, 395-97 (1996) (discussing the estoppel test applied by the Court and identifying it as a narrower version of estoppel). *See also* Alfred J. Rubin, *The International Legal Effects of Unilateral*



As the doctrine of the ICJ demonstrates, the doctrine of estoppel in international law is far from being clear and uncontroversial. Several commentators have traced its legitimacy back to its initial development in English equity courts and its subsequent Americanization with the American Law Institute's adoption of the famous Section 90 of the Restatement of Contracts. Section 90 aimed to fill the contractual gaps by expanding the range of binding contracts through promissory estoppel.<sup>105</sup> While establishing the existence of the notion of estoppel in international law might not be hard, scholars have often challenged its application as being a "wild card" because, absent its common law restraints, estoppel could allow "one who plays it in international law to make it represent any legal notion he desires."<sup>106</sup>

The fear of judicial manipulation of the doctrine of estoppel seems familiar in the European Union context. In *Yeda Tarim* the E.U. courts did not attempt to explore broad or narrow interpretations of the estoppel doctrine; rather, the CFI remained completely deaf to the claims made by the applicant. For instance, "the fact that the entry into force of the Customs Union coincided approximately with the reduction in the applicant's profits [was not] sufficient to establish a direct link between the facts complained of and the damage alleged."<sup>107</sup> The Court implied that to satisfy the causal link between the damages and the unlawful action of the EC, the applicant could have prepared a more thorough economic assessment to quantify the losses and to show that the costs of the Customs Union outweighed the benefits that Turkey never received in the

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Declaration, 1 Am. J. Int'l L. 1, 16-17 (1977) (observing that the doctrine of international estoppel was preceded by "estoppel" in Anglo-American law, and by "'preclusion' or 'forclusion'" in the civil law of Continental Europe).

105. See SPENCER BOWER, THE LAW RELATING TO ESTOPPEL BY REPRESENTATION 514-16 (4th ed. 2004) (explaining that the American interpretation of promissory estoppel, which first suggested that the theory could be an independent source of obligations, is applied by American courts in such a way that it did not lead to an expansion of the doctrine as many traditionalists had feared); see generally 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 8.11 (Joseph M. Perillo ed., 1996) (providing an overview of the historical development of promissory estoppel and noting that the doctrine was developed over five centuries).

106. Brown, *supra* note 104, at 385.

107. Case T-367/03, *Yeda Tarim ve Otomotiv Sanayi ve Ticaret A.Ş. v. Council of the European Union*, 2006 E.C.R. II-873, ¶ 59.

form of financial aid.<sup>108</sup> In its holding, the CFI turned one of the conditions to assess the non-contractual liability into a sophisticated economic quantification. However, without a particular macroeconomic expertise, common law judges have been quantifying the amount of the reliance interest by putting the plaintiff in the position he was before entering into the contract, rather than letting the plaintiff bear the costs of a “bad bargain.”<sup>109</sup>

In 1993, Yeda Tarim started his investment in Turkey in reliance on the fact that by entering into a Customs Union with the European Union, Turkey would also be entitled to receive the benefits tied to the future accession.<sup>110</sup> Rather than investing in a Turkish business for European exports, Yeda Tarim could have targeted different markets, differentiated its production, and developed more diverse geographic ambitions. While the CFI addressed some of these motives, either through an interpretation of the basis for creating liability for the EC or by putting aside difficult quantifications, the ECJ failed to reexamine Yeda Tarim’s motives in the appeal. The ECJ affirmed the decision of the CFI and dismissed the appeal by finding most of the grounds of the appeal either manifestly unfounded or inadmissible.<sup>111</sup>

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108. *Id.* ¶¶ 58-59 (reasoning that an intervening factor could have instead caused the loss of profits, “such as the structure of the Turkish market, the adaptation of Yeda Tarim’s competitors to the different markets in question, fluctuations of the national currency and the conclusion of other trade agreements by Turkey”).

109. See Marc Owen, *Some Aspects of the Recovery of Reliance Damages in the Law of Contract*, 4 OXFORD J. LEGAL STUD. 393, 394-95 (1984) (noting that the reliance damage approach, i.e., putting the plaintiff in the position he would have been in had the contract been fully performed, is the conservative approach towards damages).

110. See *Yedas Tarim*, 2006 E.C.R. II-873, ¶ 24 (detailing the company’s investment decision “to invest in the production of ball bearings because domestic production was . . . protected by a particular customs tariff”); see also RUMFORD, *supra* note 63, at 93-94 (observing that while Turkey has been included in the common market through the Customs Union, it has been “excluded from the range of projects that are designed to underpin the common market”).

111. See Case C-255/06 P, *Yeda Tarim ve Otomotiv Sanayi ve Ticaret A. v. Council of the European Union*, ¶¶ 41, 54, 59, 62, 65-66 (July 5, 2007), available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-255/06&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>.

## B. UNFULFILLED PROMISES: THE DETRIMENT FOR *YEDA TARIM*

Having established the possibility of enforcing the promises made by the European Union to Turkey through the doctrine of estoppel, especially by assessing their ongoing relationship, this Part focuses on two different sets of implications deriving from the promises made to Turkey and never fulfilled by Brussels. A first set of promises concerns the implicit benefits of a Customs Union between Turkey and the European Union in light of the future Turkish accession within a reasonable time. The second set of promises concerns the financial aid package as well as other pre-accession types of aid promised by Brussels to facilitate Turkey's restructuring its economy in light of its future E.U. membership. This Part demonstrates that in relying on the promises made by the European Union, there have been different kinds of detriments for Turkey.

The first set of promises made by Brussels concerns the Customs Union that was created by Article 10 of the Ankara Agreement in 1963. In 1970 the Additional Protocol set the conditions to establish a Customs Union and the transitional periods for its implementation.<sup>112</sup> In 1995 with Decision 1/95 of the EC-Turkey Association Council the Customs Union entered the final phase of its implementation requiring the abolition by both parties of import and export customs duties.<sup>113</sup> In this context, the European Union promised that the Customs Union would strengthen the trade relationship between the two entities.<sup>114</sup> While the Customs Union was implemented by Decision 1/95 of the EC-Turkey Association Council, its timetable extended until 2001. In *Yeda Tarim*, the claimant argued that Turkey suffered a number of financial losses with the Customs Union's entry into force. Because all the customs duties were eliminated, the Turkish industry could not compete with

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112. See Additional Protocol, *supra* note 15, art. 1.

113. EC-Turkey Association Council Decision 1/95, 1996 O.J. (L 35) 1, art. 4 [hereinafter Decision 1/95] (requiring also that both countries refrain from imposing new tariffs).

114. See Nannette A.E.M. Neuwahl, *The EU-Turkey Customs Union: A Balance, but No Equilibrium*, 4 EUR. FOREIGN AFF. REV. 37, 37-38 (1999) (stating that EC-Turkey Association Council Decision 1/95 reaffirmed the significance of the Ankara Agreement, "which provides for the accession of Turkey to the European Community 'as soon as the operation of the Agreement has advanced far enough to justify full acceptance by Turkey of the obligations [entailed in membership]'").

European products, and this resulted in huge losses for the Turkish manufacturers. Likewise, Yeda Tarim suffered large financial losses at the time of the implementation of the Customs Union.<sup>115</sup> Another detriment for Turkey, rather than a benefit as promised by Brussels, was the elimination of customs taxes so that Turkey had to increase its value-added tax (VAT) rates to balance its budget. As a result, Turkish citizens had to pay higher taxes, while the prices of goods were increasing as a result of a less competitive economy when compared to other E.U. Member States.<sup>116</sup>

In 1963, the Ankara Agreement was a compromise that the EEC reached at the time in response to Turkey's demand to become a member of the EC.<sup>117</sup> The Agreement consisted of a preliminary step for accession, provided that Turkey met the democratic and economic conditions of EU membership.<sup>118</sup> Moreover, the Ankara Agreement created a Customs Union which was not fully operative until 1996 and even after then Turkish agricultural products were still excluded from the Customs Union and limited by E.U. quotas.<sup>119</sup> Despite such exclusion, for over twenty years Turkey has restructured its agricultural policy to harmonize its standards with those of the EC because "the Community promised to take into account Turkish agricultural interests and speed of development in this sector while adopting its own rules in this field."<sup>120</sup> However,

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115. See *Yedas Tarim*, 2006 E.C.R. II-873, ¶ 23 (describing the applicant's claim that the Customs Union adversely affected the Turkish economy as a whole).

116. See Glenn W. Harrison, Thomas F. Rutherford & David G. Tarr, *Economic Implications for Turkey of a Customs Union with the European Union 3* (The World Bank Int'l Econ. Dept., Working Paper No. 1599, 1996) (estimating Turkey's revenue loss from implementing the Customs Union at 1.4% of GDP and forecasting that if Turkey decides to use the VAT to replace the lost revenues, then "VAT rates will have to increase by 16.2% in each sector to compensate for the revenue loss").

117. See ŽUKOVA, *supra* note 84, at 38 (explaining that the objective of the Ankara Agreement was to create an Association between the Parties that would ultimately facilitate Turkish accession to the EC).

118. See Ankara Agreement, *supra* note 8, art. 28 ("As soon as the operation of this Agreement has advanced far enough to justify envisaging full acceptance by Turkey of the obligations arising out of the Treaty establishing the Community, the Contracting Parties shall examine the possibility of the accession of Turkey to the Community.").

119. RUMFORD, *supra* note 63, at 92-93 (noting that while agriculture is excluded from the range of sectors included in the Customs Union, a 1998 farm agreement has reduced the quotas for Turkish farm products).

120. ŽUKOVA, *supra* note 84, at 43.

such promise was never fulfilled. Because of the failed Turkish accession, agricultural products remained excluded from the Customs Union, while Turkey had to cope with restructuring its agricultural sector according to E.U. standards.<sup>121</sup>

In *Yeda Tarim*, the damage that the applicant alleged is the current “macroeconomic imbalance” created by the inadequate aid that the EC gave to Turkey in the context of the Customs Union.<sup>122</sup> During the first year of the Customs Union, Turkey’s imports from the European Union increased significantly.<sup>123</sup> However, this was not the case for the Turkish exports to Europe, which did not increase as expected but varied sector by sector.<sup>124</sup> In 1996 the Commission recognized such imbalance in imports and exports with Turkey, and it noticed that its exports had doubled especially in the textile sector where Turkey was losing its comparative advantage.<sup>125</sup> Thus, the Customs Union was a model of pre-accession integration that did not prove very successful and that the European Union did not follow in its subsequent negotiations. In this respect, Galina Žukova explains that “once the Community has burnt its fingers by promising more than it is actually willing to offer in practical terms, it does not make the same mistake again.”<sup>126</sup>

The second detriment for Turkey stems from the promises made in relation to the Financial Protocols to the Agreement. In *Yeda Tarim*, the ECJ found that the EC’s unilateral undertaking to grant Turkey

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121. See RUMFORD, *supra* note 63, at 92-93 (noting that “not all sectors of the Turkish economy are included in the Customs Union,” including agriculture, and explaining that a 1998 farm agreement between the EU and Turkey does not “amount to an extension of the single market” because processed agricultural goods are still excluded).

122. See Case T-367/03, *Yeda Tarim ve Otomotiv Sanayi ve Ticaret A.Ş. v. Council of the European Union*, 2006 E.C.R. II-873, ¶ 20 (summarizing the applicant’s arguments).

123. RUMFORD, *supra* note 63, at 95 (reporting that “European Union exports to Turkey increased from \$15.8 billion in 1995 to \$24 billion in 1997”).

124. See *id.* (showing a modest increase in Turkey’s exports to the EU); ŽUKOVA, *supra* note 84, at 42 (comparing the growth of exports from Turkey to the EU (4%) to the imports to Turkey from the EU (32.5%) during the first year); see also Neuwahl, *supra* note 114, at 45-46 (attributing Turkey’s slower export growth to the fact that most of Turkey’s exports were industrial or manufactured goods, which have been exported to the EU without a customs tariff since 1971).

125. See ŽUKOVA, *supra* note 84, at 42 (reporting that the Commission took notice that Turkey’s imports of clothing from the EU increased by 130% in 1996).

126. See *id.* at 44.

financial help did not enter into force due to the veto of Greece in the context of the Euro-Mediterranean cooperation.<sup>127</sup> The financial package was supposed to support Turkey in addressing the possible detriment created by the Customs Union. The aim of the financial package was to enable the Turkish government to offer short-term financial aid to those sectors such as the textile industry that had suffered from the trade liberalization created by the Customs Union.<sup>128</sup> When the applicant in *Yeda Tarim* argued that the Commission and the EC defaulted on their promises because they did not take necessary steps to adopt the financial aid package, the Court responded succinctly that the European Union was not accountable for these actions.<sup>129</sup> Rather, the applicant was not able to prove which specific provisions of the financial protocols had been infringed. Further, the CFI found that the provision of “reciprocal and balanced obligations” between the parties was a vague commitment that did not have direct effect, and in turn, it could not create liability for the European Community.<sup>130</sup>

The Ankara Agreement set in place some financial aid to promote economic and democratic developments in Turkey, but this was consistently blocked by Greece until 1999 when the Commission finally proposed a smaller package of aid.<sup>131</sup> The Commission adopted this modest package of financial aid because it classified Turkey as a developing country, which did not require a unanimous vote but rather a qualified majority in the Council, thus enabling the

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127. See Case C-255/06 P, *Yeda Tarim ve Otomotiv Sanayi ve Ticaret A v. Council of the European Union*, ¶¶ 20, 50 (July 5, 2007), available at <http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&Submit=Rechercher&alldocs=alldocs&docj=docj&docop=docop&docor=docor&docjo=docjo&numaff=C-255/06&datefs=&datefe=&nomusuel=&domaine=&mots=&resmax=100>. (relaying the applicant’s allegations concerning Turkey’s deficit).

128. See Ankara Agreement, *supra* note 8, art. 3(1) (stating that “[d]uring the preparatory stage Turkey shall, with aid from the Community, strengthen its economy so as to enable it to fulfil [sic] the obligations which will devolve upon it during the transitional and final stages”).

129. Case T-367/03, *Yeda Tarim ve Otomotiv Sanayi ve Ticaret A v. Council of the European Union*, 2006 E.C.R. II-873, ¶ 50.

130. See *id.* ¶¶ 42-49 (finding that provisions relied upon by the applicant were insufficiently precise or unconditional to have direct effect in the applicant’s situation).

131. Cf. Hugg, *supra* note 2, at 1326-28 (attributing improved relations between Greece and Turkey to, among other things, the election of more moderate foreign ministers in each country).

Commission to circumvent the Greek veto.<sup>132</sup> These facts support the notion that in the long negotiation with the EU, Turkey relied on receiving some benefits from a future accession to the EU that it did not enjoy fully or timely.

### III. THE CURRENT TRADE RELATIONSHIP BETWEEN TURKEY AND THE EUROPEAN UNION CREATED BY THE ANKARA ASSOCIATION AGREEMENT AND ITS SUBSEQUENT PROTOCOL

This Part moves beyond the debate on the likelihood of Turkish accession to the European Union, and instead focuses on the significant economic and political consequences for Turkey stemming from the Ankara Agreement. There is a steep imbalance in the consequences of the free movement doctrines as interpreted by the ECJ and in the alignment of Turkish commercial policy with that of the European Union. Over time, the promise of Turkish accession to the European Union has burdened Turkey much more than Brussels, and has led to Ankara's receiving fewer benefits than anticipated.

#### A. REASSESSING THE UNBALANCED TURKEY-EUROPEAN UNION TRADE RELATIONSHIP

With the signing of the Ankara Association Agreement in 1963 and the Additional Protocol in 1970, the European Community created a large number of obligations for Turkey and rights for its citizens with respect to the free movement of workers and services and the freedom of establishment in the European Union.<sup>133</sup> Over the years, the ECJ has changed its jurisprudence in interpreting the right

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132. See RUMFORD, *supra* note 63, at 95 (underscoring the importance of the aid package to Turkey because it showed the EU would honor its Customs Union commitments).

133. See Ankara Agreement, *supra* note 8; Additional Protocol, *supra* note 15. Article 13 of the Association Agreement contains the following general provision on the freedom of establishment between the Member States and Turkey: "The Contracting Parties agree to be guided by Articles 52 to 56 and Article 58 of the Treaty establishing the Community for the purpose of abolishing restrictions on freedom of establishment between them." Article 41 of the Additional Protocol provides as follows: "The Contracting Parties shall refrain from introducing between themselves any new restrictions on the freedom of establishment and the freedom to provide services."

of free movement and the right of establishment of Turkish migrant workers and their families.<sup>134</sup> In interpreting the Ankara Association Agreement, the ECJ has strengthened those free movement rights for Turkish nationals that are directly enforceable in European domestic courts.<sup>135</sup>

Because of the Association Agreement, Turkish migrants benefit from a different status in the European Union, especially when compared to other third country nationals, with respect to work permits, visa requirements and social security entitlements.<sup>136</sup> Even though the freedom of movement of workers and services and the freedom of establishment are not yet unconditional rights for Turkish nationals, they are entitled to benefit from whatever progress is made towards the elimination of restrictions on these rights.<sup>137</sup> However, the favorable treatment of Turkish workers and their families has triggered important distributive effects for E.U. Member States. In fact, national welfare regimes are now under pressure, not only due to the competition created by the internal market, but also because of the extension of social benefits to Turkish immigrants, who have been performing an increasingly significant share of low-skill jobs.<sup>138</sup> The favorable treatment of Turkish migrants by the ECJ creates a burden which impacts mostly the domestic social security schemes of the Member States, rather than the almost non-existent E.U. social policy.<sup>139</sup>

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134. See Lenski, *supra* note 65, at 84-85 (noting deficiencies in the EU law on the freedom of movement of Turkish workers and crediting the ECJ with developing case law on the subject matter).

135. See *id.* (explaining the ECJ's decisions that found that the Association Council's decisions implementing the Ankara Agreement conferred the free movement rights to Turkish workers).

136. See Cicekli, *supra* note 96 (characterizing the EU's general approach to the issue of third country nationals' treatment as host-nation centered and attributing Turkish immigrants' more favorable status to the Ankara Agreement).

137. See *id.* (noting that the right of establishment and the freedom to provide services are not unconditional rights but acknowledging that the intra-European freedom of movement has not yet been expanded to include third country nationals). See generally CATHERINE BARNARD, *THE SUBSTANTIVE LAW OF THE EU: THE FOUR FREEDOMS* (2007).

138. See Fritz W. Scharpf, *The European Social Model: Coping with the Challenges of Diversity*, in *INTEGRATION IN AN EXPANDING EUROPEAN UNION: REASSESSING THE FUNDAMENTALS* 109, 112-15 (J. H. H. Weiler, Iain Begg & John Peterson eds., 2003) (explaining the competitive pressure that the EU places on the domestic welfare regimes of the Member States).

139. See JEAN-CLAUDE BARBIER, *LA LONGUE MARCHE VERS L'EUROPE SOCIALE*



With respect with the world trade effects of the Ankara Agreement, this created a number of obligations for the Turkish Republic because it required the country seeking E.U. membership to gradually align itself to the European common commercial policy.<sup>140</sup> This obligation has created numerous consequences for global trade, in particular with respect to Turkey's position in the WTO. Because of Turkey's restrictions on imports of textile and clothing products, India has challenged the Turkish regulations as an infringement of the WTO obligation.<sup>141</sup> At the same time, complying with such restrictions is an important obligation of the Turkey-European Union Customs Union.<sup>142</sup> Thus, the Ankara Agreement puts Turkey in a double bind situation whereby in aligning itself with the E.U. common commercial policy it violates the multilateral trade obligations of the WTO, thus opening itself up to lawsuits by third countries for such violations.

#### B. FREE MOVEMENT OF WORKERS AND SERVICES

The question of whether association agreements, similar to international treaties signed by the EC, create an individual right that is directly enforceable by domestic courts has been one of the central jurisprudential debates in E.U. international relations.<sup>143</sup> The ECJ

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DE PARIS, (PUF, coll. "Le lien social," 2008).

140. Ankara Agreement, *supra* note 8, art. 4(1); see ŽUKOVA, *supra* note 84, at 38-40 (stressing that the Customs Union "implies *inter alia* a common commercial policy" because Turkey is required, among other things, to harmonize its external trade policies with those of the Community).

141. See *supra* note 7 and accompanying text (describing India's complaint against Turkey before the WTO).

142. See Panel Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, ¶¶ 9.141-9.149, 9.156, WT/DS34/R (May 31, 1999) [hereinafter *WTO Panel Report on Turkish Textiles*] (considering Turkey's argument that it had to adopt exactly the same external trade policies as that of the Customs Union, but ultimately concluding that Turkey had to bring its measures into conformity with its WTO obligations); *WTO Appellate Body Report on Turkish Textiles*, *supra* note 7, ¶¶ 63-64 (upholding the Panel's decision that Turkey needed to bring its trade measures into conformity with their obligations under the WTO agreements).

143. See PAUL CRAIG & GRÁINNE DE BÚRCA, *EU LAW: TEXT, CASES, AND MATERIALS* 207 (4th ed. 2008) (remarking on the proliferation of academic literature on the legal effects of international agreements in the EC legal order); see also Gerhard Bebr, *Agreements Concluded by the Community and Their Possible Direct Effect: From International Fruit Company to Kupferberg*, 20 COMMON MKT. L. REV. 35, 65-73 (1983) (addressing the potential implications of using the direct effect rule, which allows European Community citizens to seek court

was called upon to interpret the text of the Ankara Agreement and its Additional Protocol to decide whether the right of free movement conferred to Turkish workers, legally employed in the EC was directly applicable.<sup>144</sup> In *Demirel* the ECJ held that the Additional Protocol and the Ankara Association Agreement, despite their international nature, have become integral parts of the E.U. legal system.<sup>145</sup> The Court has referred to Article 12 of the Agreement that expressly states that: “Contracting Parties agree to be guided by Articles 48, 49 and 50 of the Treaty establishing the Community for the purpose of progressively securing freedom of movement for workers between them.”<sup>146</sup> Article 36 of the Additional Protocol guarantees: “Freedom of movement for workers between Member States of the Community and Turkey shall be secured by progressive stages . . . .”<sup>147</sup> With these two provisions, Turkey and the EC were clearly committed towards the progressive elimination of the obstacles to free movement of goods, workers and services in their commercial relationship. The various steps in the implementation of such a commitment were to be taken through the decisions of the Association Council, the institution established by the Agreement.

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enforcement of European Community Treaty obligations, to interpret the effect of an agreement concluded by the Community with a third State); *see generally* Steve Peers, *Fundamental Right or Political Whim? WTO Law and the European Court of Justice*, in *THE EU AND THE WTO: LEGAL AND CONSTITUTIONAL ISSUES* 111 (Gráinne de Búrca & Joanne Scott eds., 2001) (presenting critiques of the ECJ’s decisions that seemed to rule out the direct effect of WTO panel reports).

144. *See* Case 12/86, *Demirel v. Stadt Schwabisch Gmund*, 1987 E.C.R. 3719, ¶ 4; Cicekli, *supra* note 96 (articulating the ECJ’s conclusion in *Demirel* that Article 12 of the Ankara Agreement and Article 36 of the Additional Protocol are programmatic and are not “sufficiently precise and unconditional to be capable of governing directly the movement of workers”).

145. *See Demirel*, 1987 E.C.R. 3719, ¶ 7 (declaring that “an agreement concluded by the Council under Articles 228 and 238 of the Treaty is . . . an act of one of the institutions of the Community . . . and, as from its entry into force, the provisions of such an agreement form an integral part of the Community legal system”).

146. *Demirel*, 1987 E.C.R. 3719, ¶ 19; Ankara Agreement, *supra* note 8, art. 12. The new numbering of the Treaty of the European Union Articles corresponds to the free movement of workers provisions included in articles 39, 40, and 50. Moreover, the Ankara Agreement includes similar provisions on the freedom of establishment and on the freedom to provide services in articles 13-14 of the Agreement.

147. Additional Protocol, *supra* note 15, art. 36 .

The question in *Demirel* was whether the provisions of the Agreement and the Protocol had direct effect, thus granting directly to Turkish citizens who were denied either working or residence permits under Member States' laws the rights protected by the E.U. free movement provisions.<sup>148</sup> When a provision is directly effective, the supremacy of E.U. law mandates that national courts apply such provision despite the fact that they could be in conflict with other domestic rules.<sup>149</sup> However, not every provision of an international treaty or an association agreement stipulated by the EC is directly applicable, and the ECJ has created a test to determine which provisions have direct effect.<sup>150</sup> This test establishes that the provisions of an association agreement that have direct effect must be clear and unconditional so that there is no need to adopt further measures to implement them.<sup>151</sup> These provisions also confer rights to private individuals that should be directly enforceable by the domestic courts of the Member States.<sup>152</sup> In *Demirel*, the ECJ refused to bestow direct effect on Article 12 of the Agreement and Article 36 of the Protocol because both provisions were not sufficiently precise and unconditional to govern directly the free movement of workers between Turkey and the EC.<sup>153</sup>

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148. See *Demirel*, 1987 E.C.R. 2719, ¶ 14 (holding that a provision of the Agreement is directly applicable when, "regard being had to its wording and the purpose and nature of the agreement itself, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure").

149. See Case 6/64, *Flaminio Costa v. E.N.E.L.*, 1964 E.C.R. 585 (holding that the EU court was not obliged to apply national law that conflicted with EU law since EU law constitutes an "independent source of law" which cannot "be overridden by domestic legal provisions"); see also Case 26/62, *Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Netherlands*, 1963 E.C.R. 1 (establishing the EU's legal principle of direct effect by ruling that individual citizens under certain conditions could enforce in national courts their Member State's legal obligations pursuant to the state's membership within the EU Community); see generally CRAIG & BÚRCA, *supra* note 143, at 206-07 (summarizing the ECJ's approach to the direct effect of international agreements).

150. See *Algemene Transport*, 1963 E.C.R. 1 (articulating the direct effect test as asking whether the provision creates a clear and unconditional legal obligation for an individual to enforce and whether the provision's spirit and general scheme reveal its intention to apply to, and be enforced by, individuals in state courts).

151. *Id.*

152. See *id.* (finding that direct effects of a treaty create "individual rights which national courts must protect").

153. *Demirel*, 1987 E.C.R. 2719, ¶ 23.

Three years later, the ECJ changed its opinion in a slightly different case interpreting a decision of the Council of Association rather than articles of the Agreement or the Protocol. In *Sevince*, the Court held that not only the Ankara Agreement itself but also the decisions of the Council of Association form integral parts of E.U. law.<sup>154</sup> Mr. Sevince, a Turkish national employed for a number of years in the Netherlands, applied for a residence permit and was denied an extension of his permit.<sup>155</sup> In support of his appeal, he cited the provisions contained in two decisions of the Council of Association.<sup>156</sup> These provisions entitled a Turkish national who belonged to the regular employment market for at least four years to have free access to employment of his choosing.<sup>157</sup> The ECJ had to decide whether the decisions of the Council of Association had direct applicability in the EC legal order.<sup>158</sup> The Court held that some provisions of the decisions of the Council of Association had direct effect for Turkish nationals if they were clear, unconditional, and directly applicable.<sup>159</sup> In this case, the Netherlands opposed the notion of direct applicability of the decisions based on the fact that the decisions are conditional in nature and not precise enough because they required national transposition into the domestic legal regimes.<sup>160</sup> In rejecting these arguments, the ECJ held that it had

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154. Case C-192/89, *Sevince v. Staatssecretaris van Justitie*, 1990 E.C.R. I-3461, ¶ 9; see also TREVOR HARTLEY, FOUNDATIONS OF EUROPEAN COMMUNITY LAW 224 (2007) (stating that the ECJ in *Sevince* “held that acts (decisions) adopted by [councils of association under association agreements] can be directly effective in the Community if they comply with the same requirements as apply to agreements between the Community and non-Member States”).

155. *Sevince*, 1990 E.C.R. I-3461, ¶¶ 3-4.

156. *Id.* ¶ 4.

157. See *id.* (explaining that Article 2(1)(b) of Decision 2/76 provided that after five years of legal employment in a Member State of the Community, a Turkish worker shall “enjoy free access in that Member State to any paid employment of his choice,” and that Article 6(1) of Decision 1/80 provided that a Turkish worker who “duly register[s] as belonging to the labour force of a Member State is to enjoy free access in that Member State to any paid employment of his choice after four years’ legal employment”).

158. *Id.* ¶ 5(2).

159. See *id.* ¶¶ 14-15, 26 (setting forth criteria to judge whether the Council of Association’s decisions that are at issue in this case have direct effect and deciding in the affirmative).

160. See *id.* ¶ 22-23, 25 (replying implicitly to the Netherlands’ argument that the decisions allowed national authorities to establish procedures for applying the rights granted to Turkish workers and ruling that those provisions simply allowed

previously permitted the execution of decisions without national transposition.<sup>161</sup> Moreover, the Court followed the opinion of Advocate General Darmon, who argued that the purpose and nature of these decisions ought to be appraised in light of the general aims of the Agreement and the Protocol.<sup>162</sup> Similar to international agreements, the decisions of the Council of Association should be a priori provisions that have direct applicability in the Member States as long as they conform to the test adopted by the ECJ.<sup>163</sup> The denial of direct effect in *Demirel* did not preclude the Court from finding that some of the decisions of the Council of Association can have direct effect.<sup>164</sup>

In following the *Sevince* precedent, the ECJ interpreted the decisions of the Council of Association to allow Turkish migrants legally employed in a Member State and their families to remain or to switch employment in that state.<sup>165</sup> In *Ku*, the ECJ held that

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Member States to promulgate necessary administrative procedures for the implementation of the decisions and did not empower them "to make conditional or restrict the application of the precise and unconditional right which the decisions of the Council of Association grant to Turkish workers"; see also Kees Jan Kuilwijk, *THE EUROPEAN COURT OF JUSTICE AND THE GATT DILEMMA: PUBLIC INTEREST VERSUS INDIVIDUAL RIGHTS?* 119 (1996) (detailing the Dutch government's argument that the safeguard clauses in the Association Council's Decisions "gave the contracting parties a unilateral power of derogation").

161. See *Sevince*, 1990 E.C.R. I-3461, ¶ 25 (citing Case 104/81, *Hauptzollamt Mainz v. Kupferberg*, 1982 E.C.R. 3641) (responding to Netherlands' argument that the decisions allowed the contracting parties to derogate from provisions on the rights of Turkish workers and finding that the decisions permitted derogation only in specific situations, and the existence of such clauses did not affect the direct effect test).

162. See *id.* ¶¶ 19-20 (discussing the purpose and nature of the decisions and the Ankara Agreement); see also Kuilwijk, *supra* note 160, at 119 (detailing how General Darmon distinguished precedent from the circumstances of the *Sevince* case).

163. *Id.* ¶¶ 14-15.

164. *Id.* ¶ 21.

165. See, e.g., Case C-237/91, *Kazım Ku v. Landeshauptstadt Wiesbaden*, 1992 E.C.R. I-6781, ¶¶ 26, 36 (ruling that a Turkish worker who has worked within a Member State for the same employer under a valid work permit for more than one year is entitled to a renewal of his work and residence permits); Case C-355/93, *Hayriye Ero lu v. Land Baden-Württemberg*, 1994 E.C.R. I-5113, ¶ 23 (allowing a Turkish national, who meets the requirements of the second paragraph of Article 7 of Decision 1/80, to obtain an extension of his residence permit); Case C-434/93, *Ahmet Bozkurt v. Staatssecretaris van Justitie*, 1995 E.C.R. I-1475, ¶¶ 10, 42 (reciting the Council of Association's Decision 1/80 as granting Turkish nationals the general right to remain employed or switch employment within a Member

Turkish migrants legally employed in the EU for at least one year have the right to remain in that employment and can rely on Article 6(1) of the Council Decision 1/80 to extend their work permits.<sup>166</sup> Mr. Ku was a Turkish national who obtained a permit to reside in Germany by virtue of his marriage.<sup>167</sup> By the time he had to renew his residence permit, he had recently divorced his German wife.<sup>168</sup> In interpreting article 6(1) of Decision 1/80 of the Council of Association, the ECJ held that under certain conditions Mr. Ku was entitled to renew his working permit.<sup>169</sup> In a more recent case, the ECJ held that Mr. Ergat, a Turkish national who had been refused permission to extend his German residence permit, could rely on Article 7 of Decision 1/80 to extend his permit.<sup>170</sup> Mr. Ergat joined his parents, who were legally employed Turkish migrants in Germany, at the age of eight and enjoyed a right of residence for the purpose of reuniting his family.<sup>171</sup> Being a resident of Germany for more than five consecutive years, the ECJ held that states cannot attach conditions to the residence of a member of a Turkish worker's family after he has been cohabitating for three years with his parents; rather, he is entitled to enter the labor market in the host state.<sup>172</sup>

Finally, in 2008 the ECJ revisited the saga of the Turkish workers with another case concerning the renewal of a working permit for an

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State, but rejecting a Turkish national's ability to remain in-state if he or she is rendered permanently incapacitated for work); Case C-340/97, *Ömer Nazlı et al. v. Stadt Nürnberg*, 2000 E.C.R. I-957, ¶¶ 49, 64 (finding that Article 6(1) of Decision 1/80's work and residence rights for Turkish nationals are not lost upon a temporary break in work); Case C-188/00, *Bülent Kurz, né Yüce v. Land Baden-Württemberg*, 2002 E.C.R. I-10691, ¶ 61 (holding that a Turkish national who entered a Member State on a student visa and subsequently stayed to undergo vocational training with an employer is a worker within the meaning of Article 6(1) of the Council of Association Decision 1/80); Joined Cases C-317/01 & C-369/01, *Eran Abatay & Nadi Sahin v. Bundesanstalt für Arbeit*, 2003 E.C.R. I-12301, ¶ 117 (agreeing generally that Decision 1/80 of the Association Council allows Turkish nationals rights, under certain conditions, to remain employed and residents of Member States).

166. *Kazım Ku*, 1992 E.C.R. I-6781, ¶ 26.

167. *Id.* ¶ 3.

168. *Id.* ¶ 4.

169. *Id.* ¶ 26 (declaring that Mr. Ku was entitled to a renewal of his work permit even if his marriage had dissolved, so long as he "has worked there for more than one year for the same employer under a valid work permit").

170. Case C-329/97, *Ergat v. Stadt Ulm*, 2000 E.C.R. I-1487, ¶ 67.

171. *Id.* ¶¶ 27-28.

172. *Id.* ¶¶ 38-40.

au pair, Ms. Payir, and two students, Mr. Akyuz and Mr. Ozturk, who were employed in part-time jobs while conducting their studies in the United Kingdom.<sup>173</sup> In interpreting Article 6(1) of Decision 1/80, the ECJ held that its precedents showed that the aim of this provision was to “consolidate progressively the position of Turkish workers in the host Member State.”<sup>174</sup> The fact that the applicants entered the host state as an au pair or as students did not deprive them of the status of workers. Because they were legally employed in the United Kingdom, they enjoyed the protection of Article 6(1), which entitled them to obtain a renewal of their working permits together with residency for one year.<sup>175</sup>

The ECJ did not shy away in adjudicating even more controversial questions that entailed important distributive effects for welfare regimes of the host states where Turkish workers and their families were residing. According to Article 10(1) of the Council of Association’s Decision 1/80, Member States cannot discriminate against legally-employed Turkish migrant workers on the basis of nationality with respect to their pay and other working conditions.<sup>176</sup> In interpreting this provision, the ECJ held that Article 10(1) of Decision 1/80 has direct effect by conferring on Turkish migrants and their families the right to enforce non-discrimination provisions in the courts of the host state.<sup>177</sup> Similarly, the Court held that Decision 3/80 of the Council of Association, which prohibited Member States from discriminating against non-nationals in the distribution of state welfare, had direct effect, and individuals could enforce it in national courts.<sup>178</sup> Mrs. Sürül reunited with her husband, a student who was entitled to work sixteen hours per week, and she held an accessory residence permit entitling her to live in Germany.<sup>179</sup> When Mrs. Sürül gave birth to a child, she was entitled

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173. See Case C-294/06, *Payir v. Sec’y of State for the Home Dep’t*, 2008 ECJ EUR-Lex LEXIS 2271, ¶¶ 9, 13, 14.

174. *Id.* ¶ 37 (citing Case C-230/03, *Mehmet Sedef v. Freie und Hansestadt Hamburg*, 2006 E.C.R. I-157, ¶ 34).

175. *Id.* ¶ 49.

176. See Case C-171/01, *Wahlergruppe ‘Gemeinsam Zajedno/Birlikte Alternative und Grune GewerkschafterInnen/UG’*, 2003 E.C.R. I-4301, ¶ 16 (quoting Article 10(1)).

177. *Id.* ¶¶ 57, 67.

178. Case C-262/96, *Sema Surul v. Bundesanstalt für Arbeit*, 1999 E.C.R. I-2685, ¶¶ 96-98.

179. *Id.* ¶¶ 35-38.

to receive a state allowance for taking care of the infant.<sup>180</sup> In 1993, the German government paid Mrs. Sürül both a family and a low income allowance, which ended in 1994 because she did not possess a standard residence permit.<sup>181</sup> The ECJ held that a Turkish national authorized to enter the German territory to reunite her family must receive from the host state the same social security benefits that German residents are entitled to by state law.<sup>182</sup> In denying the family allowance to Mrs. Sürül based on the lack of a standard residence permit, the ECJ held that the government was discriminating against a Turkish national because German law required no such document of German nationals.<sup>183</sup>

The Council of Association was supposed to implement the progressive abolition of restrictions on the freedoms of movement of services and establishment.<sup>184</sup> While neither freedom has been fully achieved in the current trade regime between Turkey and the European Union, a standstill provision in the Additional Protocol requires that Member States refrain from implementing additional restrictions on the freedom of establishment and the freedom to provide services.<sup>185</sup> This means that the restrictions that were in place at the time of the Agreement will remain valid, whereas new restrictions on these freedoms will be unlawful because the baseline of the Agreement established that Turkey and the EEC committed to move forward towards the progressive elimination of any restriction on these freedoms.<sup>186</sup>

The ECJ has interpreted the freedom of establishment and the freedom to provide services in a way that prevents Member States from introducing new restrictions on Turkish workers' ability to establish themselves in the European Union to provide and receive services.<sup>187</sup> In *Tum and Dari*, two Turkish nationals, Mr. Veli Tum

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180. *Id.* ¶ 40.

181. *Id.* ¶¶ 41-42.

182. *Id.* ¶ 98.

183. *Id.* ¶ 103.

184. See Additional Protocol, *supra* note 15, art. 41(2).

185. *Id.* art. 41(1).

186. *Id.*

187. See Joined Cases C-317/01 & C-369/01, *Eran Abatay & Nadi Sahin v. Bundesanstalt für Arbeit*, 2003 E.C.R. I-12301, ¶ 117 (prohibiting Member States from introducing restrictions unless they were enacted prior to the entry into force of the Additional Protocol).



and Mr. Mehmet Dari, were denied admission to the United Kingdom to start their own businesses.<sup>188</sup> In their appeal, the Turkish nationals claimed that their immigration petition should be examined in light of the standstill provision included in Article 41(1) of the Additional Protocol.<sup>189</sup> The ECJ held that this provision had direct effect, but it did not confer directly a right of establishment to the Turkish nationals.<sup>190</sup> However, the Court held that Article 41(1) precluded the United Kingdom from adopting any new provision that would create stricter conditions for the establishment of a Turkish national in its territory than the ones already in place at the time of the Agreement.<sup>191</sup> Recently, in *Mehmet Soysal*, the ECJ went even further in holding that no visa requirement was necessary in the case of a Turkish national who entered the territory of a Member State in order to provide a service on behalf of a Turkish company.<sup>192</sup> This judgment received wide attention by both Turkish and E.U. officials interested in monitoring the ECJ judgment that voided the German visa requirement for a Turkish truck-driver.<sup>193</sup>

To understand the bigger picture emerging from the ECJ jurisprudence in the Turkish migrant workers' cases, one ought to link this jurisprudence to the European Union-Turkey trade relationship and the *Yeda Tarım* decision. Both sets of decisions are relevant to understand a complex trade relationship because they clearly belong to the same macroeconomic strategy. There are those Turkish citizens who, by remaining at home have to cope with the increasing annual foreign trade and fiscal deficit after the implementation of the Customs Union.<sup>194</sup> In this situation Turks did

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188. Case C-16/05, *Veli Tum & Mehmet Dari v. Sec'y of State for the Home Dep't.*, 2007 E.C.R. I-07415, ¶ 29.

189. *Id.* ¶ 30.

190. *See id.* ¶¶ 46, 52, 55 (explaining the procedural nature of Article 41(1) and concluding that it does not, in itself, confer rights of entry or establishment upon Turkish citizens).

191. *Id.* ¶ 49.

192. *See* Case C- 228/06, *Mehmet Soysal, Ibrahim Savatli v. Bundesrepublik Deutschland*, Judgment of 19 February 2009.

193. *See Turkey's Chief E.U. Negotiator on ECJ's Visa Decision*, TIMETURK ENGLISH, available at <http://en.timeturk.com/turkeys-chief-eu-negotiator-on-ecjs-visa-decision-16039-haberi.html> (last visited May 18, 2009).

194. *See* ROBERT LEONARDI, COHESION POLICY IN THE EUROPEAN UNION: THE BUILDING OF EUROPE 159 (2005) (depicting the recent economic situation in Turkey as being "out of control with very high annual deficits" and also studying other newly integrating countries' economic situations).

not benefit from the Ankara Agreement where they chose to invest in a company that was put out of business by the fact that cheaper, high-quality goods arrived from Europe through the Customs Union, while cheaper, lower quality ones arrived from Asia through the WTO Free Trade regime. In either case, Turkish businesses were under the severe competitive pressure of regional and global trade without enjoying the benefits of E.U. membership.

But at the same time, those Turks who migrated to seek low-income jobs in the European Union benefited from the advantages offered by national welfare states. As to the Turkish migrants in Germany, the fact that they increasingly gained access to employment and social welfare benefits shows that Turkish workers took numerous lower income jobs during the 1980s and 1990s, before unskilled labor flooded the European Union from former Eastern European countries.<sup>195</sup> The expansion of welfare benefits to Turkish immigrants through the ECJ jurisprudence put more pressure on E.U. Member States that were increasingly cutting back on welfare benefits. However, the ECJ jurisprudence indirectly created incentives for Turks and their families to seek low-income jobs in Western Europe.

### C. WTO OBLIGATIONS FOR TURKEY

The new obligations undertaken by Turkey in the aftermath of the entry into force of the Customs Union with the EC change Turkey's relationship with other members of the WTO and players in the global trade arena. Turkey became a member of the original General Agreement on Tariffs and Trade (GATT) in 1951, which created a multilateral trading system until the entry in force of the WTO in 1995.<sup>196</sup> The WTO embodies multilateral obligations among trading

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195. UTA SAUMWEBER-MEYER & HANS DIETRICH VON LOEFFELHOLZ, FED. OFFICE FOR MIGRATION & REFUGEES (F.R.G.), IMMIGRATION OF FOREIGNERS TO GERMANY: REGIONAL DISTRIBUTION AND LABOUR MARKET INTEGRATION WITH PARTICULAR RESPECT OF TURKISH MIGRANTS 3 (Feb. 19-21, 2006), *available at* [http://migration.uni-konstanz.de/content/center/events/de/events/mexico2006/Saumweber\\_v.Loeffelholz.pdf](http://migration.uni-konstanz.de/content/center/events/de/events/mexico2006/Saumweber_v.Loeffelholz.pdf) (reporting that a substantial part of the Turkish population in Germany is still low-skilled).

196. *See, e.g.*, World Trade Organization, The 128 Countries That Had Signed GATT by 1994, [http://www.wto.org/english/thewto\\_e/gattmem\\_e.htm](http://www.wto.org/english/thewto_e/gattmem_e.htm) (last visited Mar. 29, 2009) (providing a list of signatories to the GATT and when each member joined); World Trade Organization, The General Agreement on Trade in

countries, and its core principle is the Most-Favoured-Nations clause.<sup>197</sup> This provision requires trade to be conducted on the basis of non-discrimination, and all the members are bound to give each other a treatment in tariffs and trade that is as favorable as the treatment received by any other member of the WTO.<sup>198</sup>

In 1995, Turkey notified the WTO when it was about to reach the final stage of implementing its Customs Union with the EC by means of a Decision of the Council of Association.<sup>199</sup> However, specific provisions of this Decision required Turkey to align its foreign commercial policy to EC policies regulating the import of textiles and clothing.<sup>200</sup> India challenged these provisions in the WTO dispute settlement body because it claimed that Turkey was infringing multilateral obligations by creating new quantitative restrictions through the Customs Union without formally acceding to the European Union.<sup>201</sup> Turkey responded that the same complaint should have been brought against the EC as well, even though India insisted that the Community was not accountable for the trade measure adopted by Turkey.<sup>202</sup> The WTO Panel decided that because the Turkey-EC Customs Union was not a member of the WTO, this dispute could not be subject to its dispute settlement procedures.<sup>203</sup> Despite Turkey's obligations stemming from the Customs Union with the EC, the Panel condemned Turkey for the infringement of its

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Services (GATS): Objectives, Coverage and Disciplines, ¶ 9, [http://www.wto.org/english/tratop\\_e/serv\\_e/gatsqa\\_e.htm](http://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm) (last visited Mar. 29, 2009) [hereinafter WTO Objectives] (stating that the WTO entered into force January 1, 1995).

197. See WTO Objectives, *supra* note 196, ¶ 7 (listing the Most Favored Nation principle as a general obligation that applies “directly and automatically to all Members and services sectors”).

198. See *id.* (summarizing Members' obligations).

199. See Decision 1/95, *supra* note 113, art. 1 (declaring that the purpose of Decision 1/95 is to articulate the rules “for implementing the final phase of the Customs Union”); *WTO Panel Report on Turkish Textiles*, *supra* note 143, ¶ 2.17 (noting that Turkey notified the WTO on December 22, 1995 in accordance with Article XXIV of GATT).

200. See Decision 1/95, *supra* note 113, art. 12(2) (mandating Turkey to “apply as from the entry into force of this Decision, substantially the same commercial policy as the Community in the textile sector including the agreements or arrangements on trade in textile and clothing”).

201. See *WTO Panel Report on Turkish Textiles*, *supra* note 142, ¶¶ 2.35-2.36, 3.35 (discussing India's objections to Turkey's obligations under Decision 1/95).

202. *Id.* ¶ 3.33.

203. *Id.* ¶¶ 8.3, 9.6.

obligations under the WTO.<sup>204</sup> Further, the Appellate Body upheld the finding of the Panel because Turkey did not show that, without implementing the obligations mandated by the Decision of the Council of Association, its access to the EC Customs Union would have been impossible.<sup>205</sup>

As Galina Žucova explained in this case, “Turkey was heavily relying on participation of the EC as a ‘third party,’ following India’s refusal to bring the claim against two co-respondents. However, the EC took a clear stance that it will not participate in the case in either status, a decision which very seriously undermined [the] Turkish position.”<sup>206</sup> The Turkish Textiles case demonstrates that the Customs Union created burdensome obligations for Turkey while the European Union continuously lacked accountability.

## CONCLUSION

The unbalanced trade relationship between Turkey and the European Union described in this Article remains one of the most significant causes of the backlash among Turkish legal and political elites over the constant refusals of E.U. membership. In this perspective, it is not surprising that the Turkish lawyers drafting the plaintiff’s brief in *Yeda Tarım* pointed blame at the longstanding, asymmetrical Turkey-European Union trade relationship. In the realm of the Customs Union, the accession of Turkey created burdensome obligations for the country. Further, because of the provisions on free movement stemming from the Association Agreement, Turkish migrant workers in Europe are entitled to a full protection of their right to free movement in the common market in the same way as E.U. citizens because the lower income jobs they are performing are essential to Western European societies. However, when Turkish nationals are local entrepreneurs at home, they are reminded that they are not E.U. members, and they have no

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204. See *id.* ¶¶ 9.44, 9.207-208 (finding that Turkey’s quantitative restrictions imposed on nineteen categories of textile imports from India violated its obligations under the GATT).

205. See *WTO Appellate Body Report on Turkish Textiles*, *supra* note 7, ¶¶ 58, 62-63 (finding that because alternative measures were available to Turkey that would have satisfied all of its obligations, Turkey’s decision to implement the quantitative restrictions at issue is not excused under Article XXIV of GATT, and therefore the restrictions are not justified).

206. ŽUKOVA, *supra* note 84, at 282.

reason to rely on such privileges. Yeda Tarim, a Turkish company relying on Turkey's future accession to the European Union for its business, could not recover the damages created by the fact that the

Turkish economy and balance of trade worsened rather than improved in the aftermath of the EC Customs Union.

This Article suggests understanding the *Yeda Tarim* litigation as a response to the disappointment of the Turkish elites, especially the ones who were most committed to Turkish membership in the European Union. Even though the CFI and the ECJ departed from using the doctrine of promissory estoppel as suggested by the plaintiff to create liability for the European Union in favor of Turkey, this case points to the asymmetrical trade relationship between the two parties. While the Luxembourg Courts might not be the most appropriate fora to clarify the costs and benefits of the E.U.-Turkey trade relationship, but in *Yeda Tarim*, the Courts lost a chance to assess the existence of major imbalances created by the obligations in the overall trade regime between Turkey and the European Union. By focusing on the reasons of the Turkish distrust towards Brussels, *Yeda Tarim* marks an important shift of perspective towards the current debate on Turkish membership to the European Union. In this respect, this Article suggests reassessing macroeconomic implications created by the Ankara Agreement, the Customs Union, and the promises of accession by Brussels *vis à vis* Turkish legal and political elites, local businesses, and immigrant workers in the European Union.